(19,652, 19,653, 19,654, 19,655, and 19,656.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 191.

HENRY F. WYMAN ET AL., APPELLANTS,

vs.

SUMNER WALLACE ET AL.

No. 192.

PETER FRENZER ET AL., APPELLANTS,

vs.

SUMNER WALLACE ET AL.

No. 193.

EDGAR M. MORSMAN, APPELLANT,

vs.

SUMNER WALLACE ET AL.

No. 194.

WILLIAM S. POPPLETON, APPELLANT,

vs.

SUMNER WALLACE ET AL.

No. 195.

GEORGE W. McCLELLAN, AS EXECUTOR, ETC., ET AL., APPELLANTS,

vs.

SUMNER WALLACE ET AL.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, 1904, of said court, begun and held at the United States court house in the city of St. Louis, Missouri, on the first Monday in December, to-wit: the fifth day of December, A. D. 1904, before the Honorable Walter H. Sanford, Honorable Amos M. Thayer and Honorable William C. Hook, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals
for the Eighth Circuit.

Be it remembered, that heretofore, to-wit: on the twentieth day of July, A. D. 1903, a transcript of record, in pursuance of appeals allowed by the circuit court of the United States for the district of Nebraska, in a certain cause in said court, wherein Sumner Wallace was complainant and The American National Bank of Omaha, Nebraska, and others, were respondents, was filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, which said appeals were entitled, docketed and numbered as follows, viz:

No. 1954. Charles C. George, *et al.*, appellants, *vs.* Sumner Wallace and Union National Bank of Omaha, Nebraska, appellees.

No. 1955. Elmer C. Brownlee, *et al.*, appellants, *vs.* Sumner Wallace and Union National Bank of Omaha, Nebraska, appellees.

No. 1956. Edgar M. Morsman, appellant, *vs.* Sumner Wallace and Union National Bank of Omaha, Nebraska, appellees.

No. 1957. William S. Poppleton, appellant, *vs.* Sumner Wallace and Union National Bank of Omaha, Nebraska, appellees.

No. 1958. Charles W. Morton, *et al.*, appellants, *vs.* Sumner Wallace and Union National Bank of Omaha, Nebraska, appellees, and

No. 1959. McCague Investment Company, *et al.*, appellants, *vs.* Sumner Wallace and Union National Bank of Omaha, Nebraska.

And which said transcript of record is in the words and figures following, to-wit:

1 Pleas, Before the Honorable William H. Munger, Judge of the District Court of the United States for the District of Nebraska, and sitting in the Circuit Court of the United States for the District of Nebraska, within the Eighth Judicial Circuit, at the May 1903 Term thereof.

Be It Remembered, That on the 18th day of August, 1898, Bill of Complaint was filed in the Clerk's office of said Circuit Court, which said Bill of Complaint is in words and figures following, to-wit:

To the Honorable the Judges of the Circuit Court of the United States in and for the District of Nebraska.

Comes now Sumner Wallace, a resident and citizen of the State of New Hampshire, and brings this his bill of complaint against American National Bank, a corporation, The McCague Investment Company, a corporation, Thomas H. McCague, Alex. G. Charlton, Elmer C. Brownlee, Alfred R. Dufrene, Edgar M. Morsman, Philip Mergin, George G. Wallace, William S. Poppleton, John S. King, William Wallace, Charles F. Manderson, Anna C. Crowell, Charles C. George, Robert H. McClellan, Peter Frenzer, John N. Frenzer, Charles H. Walworth, Frank W. Wessells, Frank Graham, James H. McCulloch, John P. Charlton, C. W. Morton, Royal Wilson, Jacob Wead, James J. Brown, Jr., James J. Woodward, Viola Coffin, Howard B. Smith, Edward G. Glenn, Emily J. Robinson, James H. Morton, George Morton, Mary E. Morton, William Wilson, Henry F. Wyman, Albert U. Wyman, F. R. McConnell, Trustee, John Speer, John E. Patrick, R. L. Brownlee, Caroline Carpenter, William
2 C. Beer, Marcus C. Acheson, George Marples, Arthur H. Flack, Meade C. Williams, John H. Conrad, T. R. Neal, J. H. Hawkins, William Baird, The Manufacturers National Bank of Boston, Mass., a corporation, John L. McCague, Morris Levy, National Bank Building Company of America, a corporation, John L. McCague, Thomas H. McCague, William L. McCague, and Alex. G. Charlton, partners doing business under the firm name and style of McCague Bros., Rufus B. Bullock, Thomas L. Kimball, Thos. L. Kimball, Trustee, Alex. G. Charlton, Secretary, Smauel Blackwell, and the Union National Bank of Omaha, Nebraska, and thereupon your orator complains and says:

That the American National Bank and the Union National Bank are corporations organized under and by virtue of the banking laws of the United States, for the purpose of doing business in the City of Omaha, Douglas County, Nebraska, and within the jurisdiction of the Circuit Court of the United States within and for the District of Nebraska as a national bank; that the McCague Investment Company is a corporation organized under and by virtue of the laws of the State of Nebraska, and a citizen and resident of the State of Nebraska; that the National Bank Building Company of America is a corporation organized under and by virtue of the laws of the State of Nebraska and a resident and citizen of said State, and doing business in the City of Omaha, Douglas County, Nebraska, and within the jurisdiction of this Court; that the defendant, William Wallace, is a citizen and resident of the State of Ohio; that the defendant, Anna C. Crowell, is a citizen and resident of the District of Columbia; that the defendant, Robert H. McClellan, is a citizen and resident of the State of Illinois; that the defendant, Royal Wilson is a citizen and resident of the State of Massachusetts; that the defendant,

3 William Wilson, is a citizen and resident of the State of New York; that the defendant, Jacob Wead is a citizen and resident of the State of Illinois; that the defendant, John Spear, is a citizen and resident of the State of Illinois; that the defendant, R. L. Brownlee, is a citizen and resident of the State of Ohio; that the defendant, Caroline Carpenter, is a citizen and resident of the State of Massachusetts; that the defendant, Arthur H. Flack, is a citizen and resident of the State of New York; that the defendant, Meade C. Williams, is a citizen and resident of the State of Illinois; that the defendant, J. H. Hawkins, is a citizen and resident of the State of Ohio; that the Manufacturers National Bank is a corporation organized under and by virtue of the Banking laws of the United States, for the purpose of doing business as a national bank; and is a citizen and resident of the State of Massachusetts; that Samuel Blackwell is a citizen and resident of the State of New York; that Thomas H. McCague, Alex G. Charlton, Elmer C. Brownlee, Alfred R. Dufrene, Edgar M. Morsman, Philip Mergin, George G. Wallace, William S. Poppleton, John S. King, Charles F. Manderson, Charles C. George, Peter Frenzer, John N. Frenzer, Charles H. Walworth, Frank W. Wessells, Frank Graham, James H. McCulloch, John P. Charlton, C. W. Morton, James J. Brown, Jr., James J. Woodward, Viola Coffin, Howard B. Smith, Edward G. Glenn, Emily J. Robinson, James H. Morton, George Morton, Mary E. Morton, Henry F. Wyman, Albert U. Wyman, F. R. McConnell, Trustee, John E. Patrick, William C. Beer, Marcus C. Acheson, George Mar-

ples, James H. Conrad, T. R. Neal, William Baird, John L. McCague, Morris Levy and John L. McCague, William L. McCague, Thomas H. McCague and Alex. G. Charlton, partners doing business under the firm name and style of McCague Bros., Rufus B. Bullock, Thomas L. Kimball and Alex. G. Charlton, Secretary, are each and all of them citizens and residents of the State of Nebraska.

4 And your orator further complaining says, that on the 25th day of December, 1895, the said defendant the American National Bank, for a valuable consideration, made, executed and delivered to the Union National Bank, a corporation duly organized and existing under and by virtue of the banking laws of the United States, and doing business in the City of Omaha, Nebraska, its certain promissory note for the sum of Sixty-seven Thousand Dollars ($67,000.00) a copy of which note, with all endorsements thereon, is as follows:

"$67,000.00 Omaha, Nebr., Dec. 25, 1895.

One year after date for value received, we promise to pay to the Union National Bank Sixty-seven Thousand Dollars at its Banking Office in Omaha, Neb., with interest at 6 per cent per annum from date payable quarterly until paid.

THE AMERICAN NATIONAL BANK,
By Thos. L. Kimball, President.

Attest:
Henry F. Wyman, Cas".

Indorsed:	Paid Jan. 27, 1896.....	$3,000.00
	Paid Feb. 29, 1896.....	3,000.00
	Paid Mar. 10, 1896.....	1,000.00
	Int. paid to Mar. 23, 1896.....	
	Paid May 5, 1896.....	6,000.00
	Paid May 16, 1896.....	4,000.00
	Int. paid to June 23, 1896....	
	Int. paid to Mar. 23, 1897.....	
	Paid Mch. 23, 1897.....	8,235.00
	Paid May 12, 1897.....	4,000.00

Pay Sumner Wallace or order without recourse,

UNION NATIONAL BANK,
By J. W. Thomas, its Cashier,

Aug. 8, 1898.

And your orator further complaining says, that he is now the legal owner and holder of said note, having purchased the same from the said Union National Bank, and is entitled to the proceeds thereof.

That no part of said note has been paid, except the following amounts, which are endorsed thereon, to-wit:

5 $3,000.00 paid January 27th, 1896;
3,000.00 paid February 29th, 1896;
1,000.00 paid March 10th, 1896;
Interest paid to March 23rd, 1896;
6,000.00 paid May 5th, 1896;
4,000.00 paid May 16th, 1896;
Interest paid to June 23rd, 1896;
Interest paid to March 23rd, 1897;
8,235.00 paid March 23rd, 1897;
4,000.00 paid May 12th, 1897;

And that there is now due and owing on said note to your orator from the American National Bank and the stockholders thereof the sum of Forty one thousand one hundred & seventy-nine & 76-100 Dollars.

And your orator further shows to this Court that the defendant the Union National Bank is a corporation doing business in Omaha, Douglas County, Nebraska, and within the jurisdiction of this honorable Court, under and by virtue of the laws of the United States relating to National Banks, and that said Union National Bank is as your orator is informed and believes also a creditor of said American National Bank.

And your orator further complaining says that at the time of the giving of the note described herein, the said American National Bank delivered to Thomas L. Kimball, as trustee, certain notes and property as security to the notes sued on herein and other notes given to the said Union National Bank at the same time, and that said trustee was to collect said security and apply the proceeds thereof to the payment of said notes. That your orator has not a list or description of said security and is unable to give to the Court an accurate and full description of the same, but alleges that your orator together with said Union National Bank, if it still be the owner of the other notes given by the said American National Bank, has a first lien upon said security and entitled to have the same sold and the proceeds applied toward the payment of his said note
6 in so far as the same will apply, and that the said Trustee is made a party hereto in order that he may make a full and complete statement to this honorable Court as to the security still held by him, so that said security and any other assets of said bank may be first ordered sold and the proceeds applied toward the payment of the claim of your orator and said Union National Bank, if said bank proves its claim herein, and to the end that this Honorable Court may be able to make

the proper and necessary assessment against the stockholders of the said American National Bank as hereinafter set out, requested and prayed; but your orator shows to the Court that the security so held is and will be wholly insufficient to pay the amount of indebtedness for which the same is held and that the total assets of said bank are wholly insufficient to pay the indebtedness of said bank.

And your orator further complaining says, that the said respondent, the American National Bank, on the 14th day of January, 1896, went into voluntary liquidation under the provisions of Section 5220 of the Revised Statutes of the United States, and that since said time the said corporation, the American National Bank, has not done any banking business except what may have been necessary in looking towards the closing up of its business.

And your orator further complaining says, that he is a creditor of the said American National Bank, and that he brings this action on behalf of himself and all the other creditors of the said American National Bank against the said American National Bank and the shareholders thereof.

And your orator further says that all of the respondents named in this bill were shareholders of the said Ameri-
7 can National Bank at the time that it went into liquidation, as hereinbefore set out.

That the said American National Bank was capitalized for the sum of Two Hundred Thousand Dollars ($200,000.00) divided into shares of One Hundred Dollars ($100.00) each, making in all Two Thousand (2,000) shares of stock issued by the said Bank.

That your orator has made defendants in this action all of the shareholders of the said American National Bank, in so far as your orator has been able to ascertain the names thereof.

That the respondents named herein, at the time said American National Bank went into voluntary liquidation, as hereinbefore set out, were the owners and holders of the number of shares set opposite their names, as hereinafter specified, to-wit:

Thomas H. McCague	10	shares,
Alex. G. Charlton	9	"
Elmer C. Brownlee	10	"
Alfred R. Dufrene	75	"
Edgar M. Morsman	75	"
Philip Mergin	7½	"
George G. Wallace	75	"

	William S. Poppleton	56¼	"
	John S. King	2	"
	William Wallace	20	"
	Chas. F. Manderson	10	"
	Anna C. Crowell	9 3-4	shares.
	Chas. C. George	15	"
	R. H. McClellan	50	"
	Peter Frenzer	15	"
	John N. Frenzer	5	"
	Chas. H. Walworth	22½	"
	Frank W. Wessells	3 3-4	"
	Frank Graham	3 3-4	"
	James H. McCulloch	25	"
	John P. Charlton	7½	"
	C. W. Morton	6	"
	Royal Wilson	10	"
	Jacob Wead	7½	"
	James J. Brown, Jr	5	"
	James J. Woodward	2½	"
	Viola Coffin	7½	"
	Howard B. Smith	50	"
	Edward G. Glenn	5	"
8	Emily J. Robinson	1½	shares.
	James H. Morton	2	"
	George Morton	1	"
	Mary E. Morton	1	"
	William Wilson	11¼	"
	Henry F. Wyman	58¼	"
	A. U. Wyman	10	"
	F. R. McConnell, Trustee	5	"
	John Speer	10	"
	John E. Patrick	15	"
	R. L. Brownlee	25	"
	Miss Caroline Carpenter	18	"
	W. C. Beer	6	"
	Marcus C. Acheson	15	"
	George Marples	15	"
	Arthur H. Flack	5	"
	Meade C. Williams	11¼	"
	James H. Conrad	10	"
	T. R. Neal	10	"
	J. H. Hawkins	25	"
	William Baird	10	"
	The Manufacturers National Bank	25	"
	John L. McCague	287	"
	Morris Levy	50	"

National Bank Bldg., Co., of America	615	"
McCague Bros.	50	"
Rufus B. Bullock	22½	"
Thos. L. Kimball	20	"
Alex. G. Charlton, Secretary	20	"
Samuel Blackwell	50	"

That the number of shares above set out opposite the name of Alex. G. Charlton, Secretary, to-wit: twenty (20) shares, have been at all times since the placing of said shares in the name of said Alex. G. Charlton, Secretary, and still are owned by the said defendant, McCague Investment Company, and that the said defendant, McCague Investment Company, is liable upon any assessment which may be made upon said shares of stock.

That at the time the said American National Bank, respondent, went into voluntary liquidation it had become and was wholly insolvent and unable to pay its creditors, and that
9 the said American National Bank has ever since remained and still is wholly insolvent and unable to pay its creditors.

That by reason of the insolvency of said American National Bank, and its inability to meet its obligations this action is brought against the said American National Bank and its stockholders jointly under and through the authority granted by the laws of the United States relating to banking.

That under and by virtue of the banking laws of the United States each and every of said shareholders is held individually responsible equally and ratably, and not one for another, for all contracts, debts and engagements of the said American National Bank to the extent of the amount of his, her or its stock therein, at the par value thereof, in addition to the amount invested in such shares, and that each and every of the stockholders of the said American National Bank, and each and every of the respondents named herein as stockholders, are liable for the payment of the claim of your orator and of the claims of all other creditors of said American National Bank, to the amount of stock so held by said respondent.

And your orator further says that this action is brought by your orator for and on behalf of himself and all other creditors of said American National Bank, in order that this Honorable Court may ascertain who the creditors of said American National Bank are, and the total amount of the indebtedness of said Bank, and may further ascertain the amount of assessment necessary to be made against the shareholders of said American National Bank in order to pay said

indebtedness, and that such assessments as may be necessary may be made by this Honorable Court, and that by its decree each and all of said shareholders may be required to pay into this Court the amount so found due, and that the amount
10 so found due from each of said shareholders may be and become a judgment in this action against such shareholders.

Forasmuch, therefore, as your orator can have no adequate relief, except in this Court, to the end therefore that the defendants may, if they can, show why your orator should not have the relief prayed, and may make a full disclosure and discovery of the matters aforesaid, according to the best and utmost of their knowledge, remembrance and belief, full, true, direct and perfect answer make to the matters hereinbefore stated or charged, but not under oath (an answer under oath being hereby expressly waived) your orator prays that it may be determined and ascertained in this action the amount due to your orator upon the note hereinbefore set out; and that it may further ascertain who the creditors of the said American National Bank are, and the amount of indebtedness due to your orator, and to each and every of the creditors of the said Bank, and that this Court may find, adjudge and decree the total indebtedness of the said American National Bank, and the names of all creditors thereof, together with the amounts due to each; and that this Court may further ascertain, adjudge and decree the names of the stockholders of the said American National Bank, the amount of stock held by each of them, and may make due and proper estimate against the owners and holders of said stock, in order to meet the amount of indebtedness of the said American National Bank; and may further decree and adjudge that each of said shareholders shall pay into this Court, to the use and benefit of said creditors as hereinbefore set out, the amount so found due from such shareholder under such assessment as may be made, and that the amount so found due from each of said shareholders
11 shall be and remain a judgment against said shareholder until the same shall be paid or otherwise discharged according to law.

And your orator further prays that the said defendant Thomas L. Kimball, Trustee, be required to make full and complete report to this Honorable Court of all assets of the American National Bank still in his hands and held as security for the claim of your orator and any other of the creditors of said bank and that by order of this Court all of said assets may be sold and the proceeds thereof applied toward the payment of the indebtedness so secured as by law and the agree-

ment of said parties they should, and to the further end that this Honorable Court may make due and proper assessment upon the stock and stockholders of said bank as hereinbefore prayed.

And may it please your Honors to grant unto your orator its most gracious writ of subpoena of the United States of America, directed to the said American National Bank, McCague Investment Company, Thomas H. McCague, Alex. G. Charlton, Elmer C. Brownlee, Alfred R. Dufrene, Edgar M. Morsman, Philip Mergin, George G. Wallace, William S. Poppleton, John S. King, William Wallace, Charles F. Manderson, Anna C. Crowell, Charles C. George, Robert H. McClelian, Peter Frenzer, John N. Frenzer, Charles H. Walworth, Frank W. Wessells, Frank Graham, James H. McCulloch, John P. Charlton, C. W. Morton, Royal Wilson, Jacob Wead, James J. Brown, Jr., James J. Woodward, Viola Coffin, Howard B. Smith, Edward G. Glenn, Emily J. Robinson, James H. Morton, George Morton, Mary E. Morton, William Wilson, Henry F. Wyman Albert U. Wyman, F. R. McConnell, Trustee, John Speer, John E. Patrick, R. L. Brownlee, Caroline Carpenter, W. C. Beer, Marcus C. Acheson, George Marples, Arthur H. Flack, Meade C. Williams, James H. Conrad, T. R. Neal, J. H. Hawkins, William Baird, The Manufacturers National
12 Bank, John L. McCague, Morris Levy, National Bank Building Company of America, John L. McCague, Thos. H. McCague, William L. McCague & Alex. G. Charlton, partners as McCague Bros., Rufus B. Bullock, Thomas L. Kimball, Thomas L. Kimball, Trustee, Alex. G. Charlton, Secretary, Samuel Blackwell, and the Union National Bank of Omaha, commanding them on a day certain, to appear and answer this bill of complaint, and to abide and perform such other order and decree in the premises as to the Court shall seem proper and required by the practice of equity and good conscience and your orator will ever pray

R. S. Hall,
Of Counsel.

HALL & McCULLOCH,
Attorneys for Complainant.

United States of America,
District of Nebraska—ss.

J. H. McCulloch being first duly sworn deposes and says, that he is attorney for the above named complainant, who is a non-resident and absent from the State of Nebraska; that affiant has read the foregoing bill of complaint and knows the contents thereof; that the said bill is true of his own knowledge,

except as to those matters which are therein stated to be on his information and belief, and as to those he believes it to be true.

J. H. McCULLOCH.

Subscribed in my presence and sworn to before me this 18th day of August, 1898.

ELLERY H. WESTERFIELD,
[Seal] Notary Public.
Commission expires Aug. 25, 1899.

Indorsed: Filed Aug. 18, 1898. Oscar B. Hillis, Clerk.

13 Thereupon afterwards, to-wit: On the 29th day of September 1899, Memoranda Opinion was filed in said case, within said Opinion is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

Sumner Wallace, Plaintiff,
v. No. 261 "T".
The American National Bank, et al., Defendants.

Memoranda Decision.

Munger, Judge.

As I view the case made by the bill, it seeks two objects: first, to enforce the lien of the plaintiff upon certain collateral securities deposited by the American National Bank with Thomas L. Kimball as trustee; second, to enforce the statutory liability of the stockholders of the American National Bank in pursuance of the provisions of Section 2 of the Act of June 30, 1876, First Sup. Revised Statutes.

To plaintiff's bill answers have been filed by a portion of the defendants, demurrers by other defendants, and a plea to the jurisdiction on the part of the Manufacturers National Bank of Boston, Massachusetts.

The plea to the jurisdiction will first be considered. This plea is based wholly and solely upon the fact that it is a resident and citizen of the State of Massachusetts, that it is exempt from suit in any other district than that of its residence, under the provisions of the judiciary act of 1887, as amended in 1888, which provides:

14 "And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is

an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or defendant."

If this provision of the general judiciary act is applicable in this case then the plea should be sustained and the action dismissed as to the Manufacturers National Bank. The proceeding against the Manufacturers National Bank is because of its being a stockholder in said American National Bank, and is brought under the provisions of Section 2 of the Act of 1876, before referred to, which provides an action of this character against stockholders shall be brought in a court of the United States having original jurisdiction in equity for the district in which such association may have been located or established. This is a statute conferring special jurisdiction in special cases. Prior to the passage of the Act of 1876 I know of no law which would authorize a creditor to institute a suit against the stockholder of a national bank for their liability until after the assets of the bank had been exhausted. This Act of 1876, if I read and interpret it correctly, authorizes the bringing of the suit therein mentioned immediately upon the bank going into liquidation, without reference to the fact of the solvency or insolvency of the bank. Such right of action not having previously existed, only exists by virtue of this statute, and is only authorized to be brought in the courts of the United States for the District in which the banking association was located or established, it seems clear to my mind that it is a statute conferring upon the United States courts special jurisdiction, that the right of action provided for in Section 2 cannot be maintained in a state court. Such being the
15 case, I am of the opinion that the general judiciary act of 1887-8 had reference to that class of cases in which the state and federal courts had concurrent jurisdiction, and that the act of 1887-8 did not repeal Section 2 of the Act of 1876. This view, I think, is fully sustained in Van Patten v. C. M. & St. P. Ry. Co., 74 Fed. 981; U. S. v. Mooney, 116 U. S. 104.

It follows that the plea to the jurisdiction, filed by the Manufacturers National Bank must be overruled.

As to the demurrers interposed by the several defendants, those filed on behalf of Frank Graham, James I. Woodward, and T. R. Neal can not be considered, not being in conformity with Equity Rule 31.

The Demurrer of the American National Bank must be sustained for the reason, as stated, it is a party only for the pur-

pose of having the amount of plaintiff's claim adjudicated and its lien upon the securities mentioned enforced. Suit against it is not maintainable under Section 2 of the Act of 1876. Neither is it a suit, as I view it, to wind up the affairs of a national bank. Being then a suit only, so far as the American National Bank being a proper party, to enforce the lien mentioned, jurisdiction of this court can not be sustained for the reason that it does not arise under any law of the United States and the citizenship of the parties is not such as to give this court jurisdiction, plaintiff being the assignee of a mere chose in action, its assignor, the Union National Bank, being a citizen of the same state as the American National Bank.

The other demurrers are based chiefly upon the proposition first; that complainant is not a judgment creditor; second, that the bill of complaint is indefinite and uncertain in certain respects specified.

16 The statute of June 30, 1876, under which the action is brought, does not, in my judgment, require the creditor instituting the action to be a judgment creditor as is usually required in the ordinary creditor's bill. The object and purpose of requiring in the ordinary creditor's bill, that it shall be brought by a judgment creditor is to show that an adequate remedy does not exist at law. There are no objections, however, which occur to my mind which prevent Congress from providing, as in this case, that the stockholders shall be immediately liable upon their voluntarily going into liquidation without reference to whether or not the banking association is solvent or insolvent. The language of the section of the statute is plain and unambiguous. It provides that when a banking association, without reference to whether it is solvent or insolvent goes into liquidation, an action may be brought immediately by one or more creditors on behalf of all the creditors, to enforce the stockholders' liability. This liability being one created by statute, it necessarily follows that the legislative body creating the liability may also provide when and the manner in which such liability may be enforced. So Congress, in this section, has said that the liability may be enforced immedately upon the association by vote of its stockholders go into voluntary liquidation, and this without reference to whether or not the association is solvent or insolvent. It provides also that it may be brought by any creditor, not judgment creditor, but any creditor, on behalf of himself and all other creditors. The principle announced by the Supreme Court in Case v. Beauregard, 101 U. S., 688, in my judgment is clearly applicable here as showing that the action may be maintained

by a general creditor and is not limited to one who has first reduced his claim to judgment.

17 The action being founded upon this statute, and the jurisdiction of this Court being given, the question of the citizenship of the several parties is immaterial, the rule being that where the right of action is based upon a federal statute, the United States Courts have jurisdiction without regard to diversity of citizenship. The objections that the complaint is indefinite and uncertain in certain respects is, in my judgment, without merit.

It follows from these considerations that the several demurrers must be overruled. The fact that the bill is multifarious is not presented by any of the demurrers, and, hence, that question is not before the Court.

The journal entry will save an exception to respective parties.

Indorsed: Filed Sep. 29, 1899. Oscar B. Hillis, Clerk. By R. C. Hoyt, Deputy.

18 Thereupon afterwards, to-wit: On the 5th day of December, 1899 Motion to Appoint Trustee was filed in said case, which said Motion is in words and figures following, to-wit:

In the Circuit Court of the United States, in and for the District of Nebraska.

Sumner Wallace, Complainant,
Doc. "T". vs. No. 261. In Equity.
The American National Bank, et al., Defendants.

Comes now the complainant, Sumner Wallace, and files this his motion in the above entitled action, and shows to the Court that by the original bill in this action One Thomas L. Kimball, as Trustee, held in trust certain notes, property and other securities as security to the notes mentioned in the original Bill of Complaint, and which form the basis of the action against the stockholders of said American National Bank.

That said Thomas L. Kimball, Trustee, was made a party to this action in order that the might make a full and complete statement to this Honorable Court as to the security still held by him, so that said security and any other assets of said Bank might be first ordered sold, and the proceeds applied to the payment of the claim of your orator, and the claims of the Union National Bank, and to the further end that this Honorable Court might be able to make the proper and necessary assessment against the stockholders of said American National Bank as prayed in said bill.

Said Complainant further shows that by said original bill he prayed, that said defendant, Thomas L. Kimball,
19 Trustee, might be required to make a full and complete report to this Honorable Court of all the assets of the American National Bank still in his hands, and held as security for the claim of your orator and any other creditors of said Bank; and further prayed that by order of this Court all of said assets might be sold and the proceeds thereof applied toward the payment of the indebtedness so secured, as by law and the agreement of said parties they should; and to the further end that this Honorable Court might make due and proper assessments against the stock and stockholders of said Bank, as hereinbefore prayed.

The said complainant further shows that the said Thomas L. Kimball was made Trustee as aforesaid by an agreement entered into between the said Union National Bank and the American National Bank a copy of which agreement is hereto attached and made a part of this motion.

That said agreement contemplated the carrying out of the same by said Thomas L. Kimball, as Trustee, or his successors in trust, but said agreement did not provide for any method for the appointment of a successor to said Thomas L. Kimball in case of necessity so to do.

And your complainant further shows that on the .... day of .... 1899, the said Thomas L. Kimball, Trustee, filed in this Court, a statement of the assets remaining in his hands as such Trustee, in compliance with the order of Court heretofore made, and that said assets have since been under the control and direction of this honorable Court, to which answer and statement of the said Thomas L. Kimball reference is hereby made.

Complainant further shows to the Court that since the filing of said statement and on or about the .... day of Sep-
20 tember, 1899, the said Thomas L. Kimball, deceased, and since his decease there has been no one with authority to handle or control said assets, and no one to whom any direction could be given by this Court with reference to the same; and that it is necessary that this Court appoint a successor to said Thomas L. Kimball in order that said assets may be conserved and disposed of by and under the direction of this Court, as prayed for in said original bill.

Complainant further shows that the said Thomas L. Kimball, Trustee as aforesaid, while he had control of said assets had in his employ in the management and control of the same one James Burness, who is thoroughly familiar with the said assets,

and their present condition and now has the same in his possession, and would be a suitable and proper person to act as such Trustee, and to be substituted in the place of said Thomas L. Kimball in said action.

Your Complainant therefore moves the Court for an order appointing said James Burness, as Trustee to take possession of all of the assets which were remaining in the hands of the said Thomas L. Kimball at his death, and to care for and dispose of the same under the direction of this Court, and to the end that said assets and the proceeds thereof may be used as contemplated in the original agreement between said American National Bank and the Union National Bank.

SUMNER WALLACE,
By Hall & McCulloch,
His Attorneys.

21 Agreement.

This Indenture Witnesseth: That the American National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the first part has and by these presents does hereby agree for the consideration hereinafter expressed to and with the Union National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the second part as follows, to-wit:

First: The party of the first part hereby agrees to sell and assign and does hereby sell and assign to the party of the second part the business of the party of the first part, its cash on hand, office furniture and fixtures, and such of its bills receivable as the party of the second part on examination may be willing to take as cash without recourse on the party of the first part.

Second, The party of the second part hereby agrees to purchase and does hereby purchase of the party of the first part the business of the party of the first part, cash on hand, office furniture and fixtures and such bills receivable as the party of the second part may be willing to take as cash on examination of the same without recourse on the party of the first part and to pay the party of the first part for said office furniture and fixtures the sum of $3750.00, and to assume the liabilities of the party of the first part to its depositors, and on account of its bills payable, and to liquidate the remaining assets of the party of the first part which may not be taken and received as cash by the party of the second part without charge or expense to the party of the first part, except such court charges and attorney's fees as may be found necessary and that such liquidation shall be conducted under the direction of

Thomas L. Kimball or such other person as may be agreed upon on behalf of the stockholders of the party of the first
22 part, it being understood and agreed that said Kimball, or his successor shall represent in said liquidation the stockholders of the party of the first part, and shall receive, hold and use the proceeds of the assets of the party of the first part as trustee of the parties hereto for the mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary court charges and attorneys fees attending said liquidation shall be incurred under the direction of said Kimball or his successor.

Third, In consideration of the above agreement of the party of the second part, the party of the first part hereby agrees to retain and pay one-half of the loss and expense which the party of the second part may sustain on account of the removal from its present quarters by reason of its unexpired lease on its present place of business and one-half of the loss which the party of the second part may sustain on the sale of its office furniture and fixtures, which furniture and fixtures are agreed upon at the present price and value of $3750.00, and the party of the first part further agrees to guarantee and does hereby guarantee the party of the second part against any and all loss on account of assuming the liabilities of the party of the first part as aforesaid; and to this end the party of the first part agrees to execute and deliver to the party of the second part its three promissory notes of equal sums for the amount of the liabilities which the party of the second part may assume after crediting the full amount of cash on hand and bills receivable and other assets which may be accepted by the party of the second part on examination, which notes shall draw interest from date at the rate of 6% per annum, payable quarter annually, and be payable in one, two and three years from date respectively, and shall be non-negotiable; and in
23 case of non-payment of any of said notes when due, the whole of said principal sum of all of said notes and accrued interest shall thereupon become due. And as further security to the party of the second part the party of the first part agrees to sell and assign, and does hereby sell and assign to the party of the second part all of its assets which may remain after the selection thereof by the party of the second part heretofore mentioned, including all its bills payable, stocks, bonds, personal property of every kind, and all real estate and rights and interest therein or liens thereon, with the understanding and agreement that the party of the second part shall have and hold said assets and properties subject to the right of the said Thomas L. Kimball or his successor to collect and convert the same into cash for the use and purposes heretofore expressed.

And it is further agreed that the party of the first part may pay and have credited on said notes at any time prior to maturity any sums of money of $500.00 and upwards, provided the sums so paid shall be in even hundreds.

Witness the names and corporate seal of the parties hereto this 21st day of December, A. D., 1895.

AMERICAN NATIONAL BANK OF OMAHA,
Attest: By Thomas L. Kimball, President.
Henry F. Wyman, Cashier.
UNION NATIONAL BANK OF OMAHA,
Attest: By Wm. W. Marsh, President.
Chas. E. Ford, Cashier.

Indorsed: Filed Nov. 6, 1899. Geo. H. Thummel, Clerk.

Indorsed: Filed Dec. 5, 1899. Geo. H. Thummel, Clerk.

24 Thereupon afterwards, to-wit: At the November 1899 Term of said Court, and on the 8th day of January, 1900, the following Order to Appoint James Burness, Trustee was signed and filed in said case, and duly entered of record on folio 393 Journal "Y" of said Court, to-wit:

Sumner Wallace, Complainant,
vs.
The American National Bank, et al., Respondents.

Order Appointing Trustee.

This cause having come on for hearing on the 8th day of December, 1899, upon the motion of the complainant and for the appointment of a Trustee in the place and stead of Thomas L. Kimball, and the Court being fully advised in the premises finds, that due and legal notice of the hearing of said motion was given to the respondents herein,

And the Court further finds that the said Thomas L. Kimball, mentioned in the Bill of Complainant as Trustee of the assets of the American National Bank, which assets are claimed by the Complainant to have been held by him as security for the claim of complainant and others, has, since the filing of his answer as trustee, deceased, and that it is necessary that a successor should be appointed to handle and care for said assets; and it appearing to the Court that James Burness is a proper and suitable person to act as such Trustee, and to carry out the contract and agreement by which said assets were placed in the care and custody of said Thomas L. Kimball, and that said James Burness should be appointed said Trustee.

It is therefore

Ordered that said James Burness be, and he is hereby appointed Trustee of the property and assets of the American National Bank, heretofore held by said Kimball as Trustee under and by virtue of an agreement between the American National Bank and the Union National Bank, a copy of which agreement is attached to the motion herein, and that said Burness, Trustee, shall handle and care for said assets, with the power and authority possessed by said Kimball, and that this order shall be his full authority to possess himself of all of the aforesaid property and assets remaining in the possession of said Kimball, Trustee, at the time of his decease. It is further

Ordered that the said Burness, Trustee, shall give a bond to the complainant, and the Union National Bank and the American National Bank and to be approved by the clerk of this court, in the sum of $25,000.00, conditioned to properly account for all of said property which may come into his possession by virtue of this order. To which order, each of the answering defendants duly except.

Indorsed:—Filed Jan. 8, 1900. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit:—At the January 1900 Term of said Court, and on the 7th day of February, 1900, the following proceedings were had and done in said case, as appear of record on folio 462 Journal "Y" of said Court, to-wit:—

Sumner Wallace,
261—T. vs.
American National Bank, et al.

This cause coming on to be heard, leave is hereby given to the plaintiff to file Amended Bill herein within ten days from and after this date.

Thereupon afterwards, to-wit:—On the 17th day of February, 1900, Amended Bill of Complaint was filed in said case, which said Amended Bill is in words and figures following, to-wit:—

To the Honorable the Judges of the Circuit Court of the United States in and for the District of Nebraska.

Comes now Sumner Wallace, a resident and citizen of the State of New Hampshire, and brings this his amended bill of complaint by leave of this Court duly had and obtained, against American National Bank, a corporation, The McCague Invest-

ment Company, a corporation, Thomas H. McCague, Alex. G. Charlton, Elmer C. Brownlee, Elizabeth Dufrene, Executrix of the last will and testament of Alfred R. Dufrene, deceased, Edgar M. Morsman, Philip Mergin, George G. Wallace, William S. Poppleton, John S. King, William Wallace, Charles F. Manderson, Anna C. Crowell, Charles C. George, Robert H. McClellan, Peter Frenzer, John N. Frenzer, Charles H. Walworth, Frank W. Wessells, Frank Graham, James H. McCulloch, John P. Charlton, C. W. Morton, Royal Wilson, Jacob Wead, James J. Brown, Jr., James J. Woodward, Viola Coffin, Howard B. Smith, Edward G. Glenn, Emily J. Robinson, James H. Morton, George Morton, Mary E. Morton, William Wilson, Henry F. Wyman, Albert U. Wyman, F. R. McConnell, Trustee, John Speer, John E. Patrick, R. L. Brownlee, Caroline Carpenter, William C. Beer, Marcus C. Acheson, George Marples, Arthur H. Flack, Meade C. Williams, James H. Conrad, T. R. Neal, J. H. Hawkins, William Baird, The Manufacturer's National Bank of Boston, Mass., a corporation, John L. McCague, Morris Levy, National Bank Building Company of America, a corporation, John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners doing business under the firm name and style of McCague Bros., Rufus B. Bullock, Thomas L. Kimball, James Burness, Trustee, Alex. G. Charlton,
28 Secretary, Samuel Blackwell, and the Union National Bank of Omaha, Nebraska, and thereupon your orator complains and says:—

That the American National Bank and the Union National Bank are corporations organized under and by virtue of the banking laws of the United States, for the purpose of doing business in the City of Omaha, Douglas County, Nebraska, and within the jurisdiction of the Circuit Court of the United States within and for the District of Nebraska, as national banks; that the McCague Investment Company is a corporation organized under and by virtue of the laws of the State of Nebraska, and a citizen and resident of the State of Nebraska; that the National Bank Building Company of America is a corporation organized under and by virtue of the laws of the State of Massachusetts and a resident and citizen of said State, but doing business in the City of Omaha, Douglas County, Nebraska, and within the jurisdiction of this Court; that the defendant, William Wallace, is a citizen and resident of the State of Ohio; that the defendant, Anna C. Crowell, is a citizen and resident of the District of Columbia; that the defendant, Robert H. McClellan, is a citizen and resident of the State of Illinois; that the defendant Royal Wilson, is a citizen and resident of the State of Massachusetts; that the defendant, William Wilson, is a citizen and resident of the State of New

York; that the defendant, Jacob Wead, is a citizen and resident of the State of Illinois; that the defendant, John Speer, is a citizen and resident of the State of Illinois; that the defendant, R. L. Brownlee, is a citizen and resident of the State of Ohio; that the defendant, Caroline Carpenter, is a citizen and resident of the State of Massachusetts; that the defendant, Arthur H. Flack, is a citizen and resident of the State of New York; that the defendant, Meade C. Williams, is a citizen and resident of
29 the State of Illinois; that the defendant, J. H. Hawkins, is a citizen and resident of the State of Ohio; that the Manufacturers' National Bank is a corporation organized under and by virtue of the Banking Laws of the United States, for the purpose of doing business as a national bank, and is a citizen and resident of the State of Massachusetts; that Samuel Blackwell is a citizen and resident of the State of New York; that Thomas H. McCague, Alex. G. Charlton, Elmer C. Brownlee, Alfred R. Dufrene, Edgar P Morsman, Philip Mergin, George G. Wallace, William S. Poppleton, John S. King, Charles F. Manderson, Charles C. George, Peter Frenzer, John N. Frenzer, Charles H. Walworth, Frank W. Wessells, Frank Graham, James H. McCulloch, John P. Charlton, C. W. Morton, James J. Brown, Jr., James J. Woodward, Viola Coffin, Howard B. Smith, Edward G. Glenn, Emily J. Robinson, James H. Morton, George Morton, Mary E. Morton, Henry F. Wyman, Albert U. Wyman, F. R. McConnell, Trustee, John E. Patrick, William C. Beer, Marcus C. Acheson, George Marples, John H. Conrad, T. R. Neal, William Baird, John L. McCague, Morris Levy and John L. McCague, William L. McCague, Thomas H. McCague, and Alex. G. Charlton, partners doing business under the firm name and style of McCague Bros., Rufus B. Bullock, Thomas L. Kimball and Alex. G. Charlton, Secretary, are each and all of them citizens and residents of the State of Nebraska, and that all of the parties were at the time of the filing of the bill in this cause, and still are residents and citizens as hereinbefore averred, except Alfred R. Dufrene and Thomas L. Kimball, who have since deceased.

And your orator shows to this Honorable Court that in the year 1894, until December 1895, the said Union National Bank and the said American National Bank, by means of their officers and agents, held repeated conferences with re-
30 spect to the taking over of the business and office and office fixtures of the American National Bank by said Union National Bank, and the terms under which the said arrangement could be consummated. That numerous meetings were held between the prominent stockholders of the two said Banks, with that end in view.

That in the month of December, 1895, the American National Bank aforesaid was in such a financial condition that it became necessary for it to provide in some manner for the payment of a large amount of its deposits on or about January 1st, 1896, and that it did not have on hands sufficient funds with which to meet the demands which it knew would be made upon it at that time, and which, if not paid, would precipitate a demand by all of its depositors, and thus bring on at once the failure of the bank, with all the attendant loss to depositors.

That the amount of deposits at said time, and for which the Bank was liable upon call, was the sum of $193,949.78, and that the amount of available cash to meet the same was only the sum of $36,979.78.

That negotiations were then entered into by the officers of the Bank with the Union National Bank of Omaha, Nebraska, for a transfer of the business of the said American National Bank to the said Union National Bank, and to ascertain whether or not some arrangement could be entered into whereby the immediate obligations of the American National Bank should be paid, and an opportunity be given to realize upon its assets.

That as a result of said negotiations, and by and under the direction of the Board of Directors of the said American National Bank and the Board of Directors of the said
31 Union National Bank, a contract was entered into by and between said banks, which contract was signed by said American National Bank, by Thomas L. Kimball, President, and attested by Henry F. Wyman, Cashier, and by the said Union National Bank by William W. Marsh, President, and attested by Charles E. Ford, Cashier.

That a copy of said contract is hereto attached, marked "A" and prayed to be taken as part of this amended bill.

That immediately after the signing of the said agreement the transfer of the business of said American National Bank was made to the said Union National Bank pursuant to said agreement, and the said Union National Bank at once assumed the payment of all of the liabilities of the said American National Bank on the books of the said bank at the time of said transfer, except liabilities for circulation and stockholders, and the said Union National Bank, long prior to the commencement of this action, has paid all of such deposits in full.

That the liabilities so as aforesaid assumed by the Union National Bank were as follows:

Deposits	$193,949.78
Demand certificates	5,388.00
Time certificates	25,155.55
Certified checks	452.04
Cashier's checks	327.66
Banks and bankers	13,824.27
Bills payable	50,000.00

And that at said time the said Union National Bank received from the American National Bank the following items in cash, drafts and notes, as follows:

Cash	$36,795.78
Drafts on American Exchange National Bank, Chicago	8,000.00
Drafts on Lincoln National Bank, Chicago	2,000.00
Drafts on Continental National Bank, St. Louis	284.61
Drafts on Howard National Bank, Boston	87.40
Drafts on Central National Bank, Philadelphia	1,000.00
American Cashier's check	39,929.51
3 notes, $67,000 each, 1, 2 & 3 years	201,000.00
	$289,097.30

That the Cashier's check of $39,929.51 was paid by turning over to said Union National Bank notes for $22,299.10, and a cashier's check for $17,000, which was afterwards paid by the American National Bank.

Your orator further shows that the liabilities of the said American National Bank assumed by the said Union National Bank in excess of the assets of the said American National Bank taken and accepted by the Union National Bank as cash, and without recourse, pursuant to the aforesaid agreement, amounted to the sum of Two Hundred and One Thousand Dollars ($201,000.00).

That immediately after ascertaining under said agreement the amount of liabilities of the American National Bank assumed by the said Union National Bank in excess of the assets of the American National Bank taken and accepted by the Union National Bank as cash and without recourse, and on, the 23rd day of December, 1895, the said American National Bank, pursuant to the terms of said agreement and in
33 performance thereof, executed to the said Union National Bank its three promissory notes, aggregating the amount ascertained as aforesaid, to-wit: the said sum of Two

Hundred and One Thousand Dollars, each of said notes being for the sum of Sixty-seven Thousand Dollars ($67,000.00) and bearing interest at the rate of six per cent per annum from date, one of said notes maturing in one year from its date, one in two years from its date, and one in three years from its date.

That the balance of the assets of the said American National Bank, being all of the assets of the said American National Bank not taken by the said Union National Bank as cash, and without recourse, and in pursuance to and in performance of said agreement, were turned over to one Thomas L. Kimball, as Trustee of the parties to said agreement, to collect and convert the same into cash for the uses and purposes expressed in said agreement.

And your orator further complaining says, that on the 8th day of August, 1898, the said Union National Bank sold, assigned and transferred said note due in one year from date to your orator for a valuable consideration, and that your orator is and was at the commencement of this action the legal owner and holder thereof.

That a copy of said note, with endorsements thereon, is in words and figures as follows:

"$67,000.00. Omaha, Neb., Dec. 23, 1895.

One year after date, for value received, we promise to pay to the Union National Bank Sixty-seven Thousand Dollars at its Banking office in Omaha, Neb., with interest at 6 per cent per annum from date payable quarterly until paid.

THE AMERICAN NATIONAL BANK,
Attest: By Thomas L. Kimball, President.

Henry F. Wyman, Cas".

34 Endorsed: Paid Jan. 27, 1896.....$3,000.00
Paid Feb. 29, 1896..... 3,000.00
Paid Mar. 10, 1896..... 1,000.00
Int. paid to Mar. 23, 1896.
Paid May 5, 1896..... 6,000.00
Paid May 16, 1896..... 4,000.00
Int. paid to June 23, 1897.
Int. paid to Mar. 23, 1897.
Paid Mar. 23, 1897..... 8,235.00
Paid May 12, 1897..... 4,000.00

Pay Sumner Wallace or order, without recourse,

UNION NATIONAL BANK,
Aug. 8, 1898. By J. W. Thomas, its Cashier."

That there is now due and owing on said note to your orator from the said American National Bank the sum of $

And your orator further shows to this Court that the defendant the Union National Bank is a corporation doing business in Omaha, Douglas County, Nebraska (and within the jurisdiction of this Court) under and by virtue of the laws of the United States relating to national banks, and that said Union National Bank is as your orator is informed and believes, also a creditor of the said American National Bank, and is still the owner and holder of the two other notes hereinbefore described.

Your orator further avers and shows to this Honorable Court that the stockholders of the said American National Bank, including these defendants, and each and every of them, were, and each of them was advised of the situation and condition of the said American National Bank with respect to its inability to pay its depositors and liabilities at the time of the making of the agreement and notes hereinbefore set out, and that unless some arrangement was made to procure assistance for said American National Bank the said Bank could not pay its depositors, and that the loss under such circum-
35 stances would be very great, and that the liability of the stockholders would be greatly increased.

And your orator shows that with knowledge of such condition and liability of said American National Bank, the said stockholders and each and every of them, and the said corporation, the American National Bank, accepted and received the benefits of such contract and ratified and affirmed the same, and allowed, permitted and induced the said Union National Bank to pay out the said sums of money so as aforesaid paid by said Union National Bank to the depositors of the American National Bank, and accepted the benefits of said agreement and the payments of the same.

And your orator charges the fact to be that by means of the actions and inducements of the officers and agents of the American National Bank, and by means of the execution of said notes and contracts so as aforesaid made by and with the consent, procurement and inducement of the said stockholders, the defendants herein, and with the knowledge and consent of the said defendant, procured the Union National Bank to advance the money to pay off the aforesaid liabilities of the American National Bank, and procured the said Union National Bank to expend large sums of money to pay off and satisfy said liabilities, and that by means of such contract and notes the said defendants procured the said Union National

Bank to expend the sum of over Two Hundred and Eighty Thousand Dollars in extinguishing, paying off and selling the obligations of said American National Bank.

And this complainant charges the fact to be that the said defendants were, and each of them was advised of the negotiations during the time the same were pending, and the purpose and design of such negotiations, and acquiesced in the same and consented thereto.

36 And your orator further complaining says that at the time of the giving of the note described herein, the said American National Bank delivered to Thomas L. Kimball, as trustee, certain notes and property as security to the notes sued on herein and other notes to the said Union National Bank at the same time, and that said trustee was to collect said security and apply the proceeds thereof to the payment of said notes. That your orator has not a list or description of said security and is unable to give to the Court an accurate and full description of the same.

But your orator shows to the Honorable Court that the assets of the said American National Bank which, by the terms of said contract were not taken as cash, but which passed to the trustee, Thomas L. Kimball, are now held by one James Burness as Trustee, said Kimball since the commencement of this action having deceased, and the said Burness having been by the Court appointed his successor, and to the end that this Honorable Court may have all the matters herein for its cognizance, and for the preservation of such property and due administration of such trusteeship, and thus be able to do full and complete equity to all the parties hereto in and about the assessment and judgment against the stockholders of the said American National Bank as hereinafter set out, your orator shows that the said James Burness, Trustee, should bring into this Court the said assets in his hands to be and abide the order of this Honorable Court in and about the same, as equity and good conscience may require, so that full and complete justice may be done herein in the assessment and judgment herein prayed, and in the final liquidation of said bank, and the distribution of its assets by the final decree herein, or as may be just and equitable.

37 And your orator further complaining says' that the said respondent, the American National Bank, on the 14th day of January, 1896, went into voluntary liquidation under the provisions of Section 5220 of the Revised Statutes of the United States, and that since said time the said corporation, the American National Bank, has not done any banking

business except what may have been necessary in looking towards the closing up of its business.

And your orator further complaining avers and shows to the Court that he is a creditor of the said American National Bank, as hereinbefore shown, and that he brings this action on behalf of himself and all the other creditors of said American National Bank, against the said American National Bank and the shareholders thereof, to the end that the affairs of said Bank may be fully settled and [would] up, and that your orator, for himself, and all other creditors of said Bank, may have a decree and judgment against the said shareholders, as by law provided.

And your orator further says that all of the respondents named in this bill were shareholders of the said American National Bank at the time that it went into liquidation, as hereinbefore set out.

That the said American National Bank was capitalized for the sum of Two Hundred Thousand Dollars ($200,000.00) divided into shares of One Hundred Dollars ($100.00) each, making in all Two Thousand (2,000) shares of stock issued by the said Bank.

That your orator has made defendants in this action all of the shareholders of the said American National Bank, insofar as your orator has been able to ascertain the names thereof.

That the defendants named herein, at the time said American National Bank went into voluntary liquidation, as
38 hereinbefore set out, were the owners and holders of the number of shares set opposite their names, as hereinafter specified, to-wit::

Thomas H. McCague	10	shares,
Alex. G. Charlton	9	"
Elmer C. Brownlee	10	"
Alfred R. Dufrene	75	"
Edgar M. Morsman	75	"
Philip Mergin	7½	"
George G. Wallace	75	"
William S. Poppleton	56¼	"
John S. King	2	"
William Wallace	20	"
Chas. F. Manderson	10	"
Anna C. Crowell	9 3-4	"
Chas. C. George	15	"
R. H. McClellan	50	"
Peter Frenzer	15	"
John N. Frenzer	5	"

	Chas. W. Walworth.....22½	"
	Frank W. Wessells..... 3 3-4	"
	James H. McCulloch.....25	"
	John P. Charlton..... 7½	"
	C. W. Morton..... 6	"
	Royal Wilson.....10	"
	Jacob Wead..... 7½	"
	James J. Brown, Jr..... 5	"
	James J. Woodward..... 2½	"
	Viola Coffin 7½	"
	Howard B. Smith.....50	"
	Edward C. Glenn..... 5	"
	Emily J. Robinson..... 1½	"
	James H. Morton..... 2	"
	George Morton..... 1	"
	Mary E. Morton..... 1	"
	William Wilson 11¼	"
	Henry F. Wyman.....58¼	"
	A. U. Wyman.....10	"
	F. R. McConnell, Trustee..... 5	"
	John Speer.....10	"
	John E. Patrick.....15	"
	R. L. Brownlee.....25	"
	Miss Caroline Carpenter.....10	"
	W. C. Beer..... 6	"
	Marcus A. Acheson.....15	"
	George Marples.....15	"
	Arthur H. Flack..... 5	"
	Meade C. Williams.....11¼	"
	James H. Conrad.....10	"
	T. R. Neal.....10	"
	J. H. Hawkins.....25	"
	William Baird.....10	"
39	The Manufacturers National Bank 25	shares,
	John L. McCague.....287	"
	Morris Levy.....50	"
	National Bank Bldg. Co. of America 615	"
	McCague Bros. 50	"
	Rufus B. Bullock.....22½	"
	Thos. L. Kimball.....20	"
	Alex. G. Charlton, Secretary....20	"
	Samuel Blackwell.....50	"

That the number of shares above set out opposite the name of Alex. G. Charlton, Secretary, to-wit: twenty (20) shares, have been at all times since the placing of said shares in the

name of the said Alex. G. Charlton, Secretary, and still are owned by the said defendant, McCague Investment Company, and that the said defendant, McCague Investment Company, is liable upon any assessment which may be made upon said shares of stock.

That the said American National Bank, defendant, at the time it went into voluntary liquidation, and during the months of December, 1895, and January, 1896, and for a long time prior thereto, was wholly insolvent and unable to pay its creditors, and that the said American National Bank has ever since remained and still is wholly insolvent and unable to pay its creditors.

That by reason of the voluntary liquidation of the said Bank as hereinbefore set forth and the insolvency of said bank, and its inability to meet its obligations, this action is brought against the said American National Bank and its stockholders jointly under and through the authority granted by the laws of the United States relating to banking.

And your orator shows to this Court that under and by virtue of the banking laws of the United States, each and every of said shareholders, holders of stock of said American National Bank, is held individually responsible equally and ratably, and not one for another, for all contracts, debts and engagements of the said American National Bank to the extent of the amount of his, her or its stock therein, at the par value thereof, in addition to the amount invested in said shares, and that each and every of the stockholders of the said American National Bank, and each and every of the defendants named herein, are liable for the payment of the claim of your orator and of the claims of all other creditors of said American National Bank, to the amount of stock so held by said defendant.

And your orator further says that this action is brought by your orator for and on behalf of himself and all other creditors of the said American National Bank, in order that this honorable Court may ascertain who the creditors of said American National Bank are, and the total amount of the indebtedness of said Bank, and may further ascertain the amount of assessment necessary to be made against the shareholders of said American National Bank in order to pay such indebtedness, and that such assessment as may be necessary may be made by this Honorable Court, and that by its decree each and all of said shareholders may be required to pay into this Court the amount so found due, and that the amount so found due from each of said shareholders may be and become a judgment in this action against such shareholders.

And your orator shows to this Honorable Court that the Trustee so as aforesaid appointed should be brought into this Honorable Court to bring into this cause the assets so as by said agreement to him conveyed, to have the same subject to the order of this Honorable Court, as to it may seem meet, and to be and abide its order that complete equity may be done in respect to all the parties hereto, and that the affairs
41 of this said defendant, the American National Bank, may be marshalled between all parties and wound up and litigated in a due, orderly and equitable manner, and that the assets so in the hands of said Trustee may be preserved for the benefit of the creditors and shareholders of said American National Bank and dealt with as equity and good conscience may require.

And your orator further shows to this Honorable Court that since the filing of the original bill in this action the said Alfred R. Dufrene has deceased, and this action has been revived in the name of Elizabeth Dufrene, Executrix, of the last will and testament of said Alfred R. Dufrene.

Forasmuch, therefore, as your orator can have no adequate relief, except in this Court, to the end therefore that the defendants, may, if they can, show why your orator should not have the relief prayed, and may make a full disclosure and discovery of the matters aforesaid, according to the best and utmost of their knowledge, remembrance and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath (an answer under oath being hereby expressly waived) your orator prays that it may be determined and ascertained in this action the amount due to your orator upon the note hereinbefore set out; and that it may further ascertain who the creditors of the said American National Bank are, and the amount of indebtedness due to your orator, and to each and every of the creditors of the said Bank, and that this Court may find, adjudge and decree the total indebtedness of the said American National Bank, and the names of all creditors thereof, together with the amounts due to each; and that this Court may further ascertain, adjudge and decree the names of the stockholders of the said American National Bank, the amount of stock held by each of
42 them, and may make due and proper assessment against the owners and holders of said stock, in order to meet the amount of indebtedness of the said American National Bank; and may further decree and adjudge that each of said shareholders shall pay into this Court, to the use and benefit of said creditors as hereinbefore set out, the amount so found due from said shareholders under such assessment as may be

made, and that the amount so found due from each of said shareholders shall be and remain a judgment against said shareholder until the same shall be paid or otherwise discharged according to law.

And your orator further prays that the said defendant, James Burness, be required to make full and complete record to this Honorable Court of all assets of the American National Bank still in his hands and held as security for the claim of your orator and any other of the creditors of said bank, and to be and abide the order of the Court herein as may be equitable and of good conscience to the further end that this Honorable Court may make due and proper assessment upon the stock and stockholders of said bank as hereinbefore prayed.

And may it please your honors to grant unto your orator its most gracious writ of subpoena of the United States of America, directed to the said American National Bank, McCague Investment Company, Thomas H. McCague, Alex. G. Charlton, Elmer C. Brownlee, Elizabeth Dufrene, Executrix of the last will and testament of Alfred R. Dufrene, deceased, Edgar M. Morsman, Philip Mergin, George G. Wallace, William S. Poppleton, John S. King, William Wallace, Charles F. Manderson, Anna C. Crowell, Charles C. George, Robert H. McClellan, Peter Frenzer, John N. Frenzer, Charles H. Walworth, Frank W. Wessells, Frank Graham, James H. McCulloch, John P. Charlton, C. W. Morton, Royal Wilson,
43 Jacob Wead, James J. Brown, Jr., James J. Woodward, Viola Coffin, Howard B. Smith, Edward G. Glenn, Emily J. Robinson, James H. Morton, George Morton, Mary E. Morton, William Wilson, Henry F. Wyman, Albert U. Wyman, F. R. McConnell, Trustee, John Speer, John E. Patrick, R. L. Brownlee, Caroline Carpenter, W. C. Beer, Marcus C. Acheson, George Marples, Arthur H. Flack, Meade C. Williams, James H. Conrad, T. R. Neal, J. H. Hawkins, William Baird, The Manufacturers National Bank, John L. McCague, Morris Levy, National Bank Building Company of America, John L. McCague, William L. McCague, Thomas H. McCague, and Alex. G. Charlton, partners as McCague Bros., Rufus B. Bullock, Thomas L. Kimball, Alex. G. Charlton, Secretary, Samuel Blackwell and the Union National Bank of Omaha, commanding them on a day certain, to appear and answer this bill of complaint, and to abide and perform such other order and decree in the premises as to the Court shall seem proper and required by the practice of equity and good conscience; and your orator will ever pray.

HALL & McCULLOCH,
JAMES H. MACOMBER,
Attorneys for Complainant.

United States of America,
District of Nebraska—ss.

J. H. McCulloch, being first duly sworn deposes and says that he is attorney for the above named complainant; who is a non-resident and absent from the State of Nebraska; that affiant has read the foregoing bill of compliant and knows the contents thereof; that the said bill is true of his own knowledge, except as to those matters which are therein stated to be on his information and belief, and as to those he believes it to be true.

J. H. McCULLOCH.

Subscribed in my presence and sworn to before me this 17th day of February, 1900.

ELLERY H. WESTERFIELD,
[Seal] Notary Public.

Exhibit "A".

Agreement.

This Indenture Witnesseth: That the American National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the first part, has and by these presents does hereby agree for the considerations hereinafter expressed to and with the Union National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the second part, as follows, to-wit:

First: The party of the first part hereby agrees to sell and assign and does hereby sell and assign to the party of the second part the business of the party of the first part, its cash on hand, office furniture and fixtures and such of its bills receivable as the party of the second part on examination may be willing to take as cash without recourse on the party of the first part.

Second: The party of the second part hereby agrees to purchase and does hereby purchase from the party of the first part the business of the party of the first part, cash on hand, office furniture and fixtures and such bills receivable as the party of the second part may be willing to take as cash on examination of the same without recourse on the party of the first part and to pay the party of the first part for said office furniture and fixtures the sum of Three Thousand Seven Hundred and Fifty Dollars ($3,750) and to assume the liabilities of the party of the first part to its depositors and on account of its bills payable and to liquidate the remaining assets
45 of the party of the first part which may not be taken and received as cash by the party of the second part

without charge or expense to the party of the first part, except such court charges and attorney's fees as may be found necessary, and that such liquidation shall be conducted under the direction of Thomas L. Kimball or such other person as may be agreed upon on behalf of the stockholders of the party of the first part, it being understood and agreed that said Kimball or his successor shall represent in said liquidation the stockholders of the party of the first part and shall receive, hold and use the proceeds of the assets of the party of the first part as trustee of the parties hereto for the mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary court charges and attorney's fees attending said liquidation shall be incurred under the direction of the said Kimball, or his successor.

Third: In consideration of the above agreement of the party of the second part, the party of the first part hereby agrees to sustain and pay one half of the loss and expense which the party of the second part may sustain on account of removal from its present quarters by reason of its unexpired lease on its present place of business, and one half of the loss which the party of the second part may sustain on the sale of its office furniture and fixtures, which furniture and fixtures are agreed upon at the present price and value of Three Thousand Seven Hundred and Fifty Dollars ($3,750) and the party of the first part further agrees to guarantee and does hereby guarantee the party of the second part against any and all loss on account of assuming the liabilities of the party of the first part as aforesaid. And to this end the party of the first part agrees to execute and deliver to the party of the second part its
46 three promissory notes of equal sums for the amount of liabilities which the party of the second part may assume after crediting the full amount of cash on hand and bills receivable and other assets which may be accepted by the party of the second part on examination, which notes shall draw interest from date at the rate of six per cent per annum, payable quarter-annually and be payable in one, two and three years from date, respectively, and shall be non-negotiable.

And in case of non-payment of any of said notes when due, the whole of said principal sum of all of said notes and accrued interest shall thereupon become due. And as further security to the party of the second part, the party of the first part agrees to sell and assign and does hereby sell and assign to the party of the second part all of its assets which may remain after the selection therefrom by the party of the second part heretofore mentioned, including all its bills receivable,

stocks, bonds, personal property of every kind and all real estate and rights and interests therein or lien thereon, with the understanding and agreement that the party of the second part shall have and hold said assets and properties subject to the right of the said Thomas L. Kimball, or his successor, to collect and convert the same into cash for the uses and purposes hereinbefore expressed.

And it is further agreed that the party of the first part may pay and have credited on said notes at any time prior to maturity any sums of money of Five Hundred Dollars ($500) and upwards, provided the sums so paid shall be in even hundreds.

Witness the names and corporate seals of the parties
47 hereto this 21st day of December, A. D. 1895.

THE AMERICAN NATIONAL BANK
OF OMAHA,

Attest: By Thomas L. Kimball, President.
Henry F. Wyman, Cashier.

UNION NATIONAL BANK OF OMAHA,

Attest: By Wm. W. Marsh, President.
Chas. E. Ford, Cashier.

Indorsed: Filed Feb. 17, 1900. Geo. H. Thummel, Clerk.

Re-Filed Jan. 8, 1901. Geo. H. Thummel, Clerk.

48 Thereupon afterwards, to-wit: At the November 1901 Term of said Court, and on the 8th day of January, 1901, the following proceedings were had and done in said case, as appear of record on folio 244 Journal "Z" of said Court, to-wit:

Sumner Wallace,
261-T vs.
American National Bank, et al.

Order.

Now at this time, this 31st day of December, A. D. 1900 the motions heretofore filed to strike the amended bill of complainant from the files came on to be heard, whereupon, on consideration of the same, the Court sustains the motions to strike said amended bill, with leave of the complainant to apply to refile the same on compliance with Equity Rule 29.

49 Thereupon afterwards, to-wit: At the November 1900 Term of said Court, and on the 8th day of January,

1901, the following Order was signed and filed in said case, and duly entered of record on folio 244, Journal "Z" of said Court, to-wit:

Sumner Wallace,
vs.
American National Bank, et al.,

Order.

Now at this time, this 8th day of January, A. D. 1901, the motion of the complainant to refile his amended bill came on to be heard, whereupon the Court, having inspected said motion and the notices served upon the several defendants therefor, finds that all of the defendants who have appeared by counsel in said case were duly served with notice of the hearing of said motion, and the complainant having complied with the order heretofore made in reference to Equity Rule 29, it is therefore

Ordered that the complainant may file his amended bill instanter. To all of which the defendants excepted. The defendants are given leave to withdraw their respective answers and refile the same, or plead to said amended bill as they may elect, by Feb. 4th next, and all respondents to plead or answer said amended bill by Feb. 4th next.

W. H. MUNGER, Judge.

Indorsed: Filed Jan. 8, 1901. Geo. H. Thummel, Clerk.

50 Thereupon afterwards, to-wit: On the 24th day of January, 1901, Answer of Edgar M. Morsman to Amended Bill of Complaint was filed in said case which said Answer is in words and figures following, to-wit:

In the Circuit Court of the United States within and for the District of Nebraska.

Sumner Wallace, Complainant,
Doc. "T". vs. Page 261.
American National Bank, et al., Defendants.

Separate Answer of Edgar M. Morsman, one of the Defendants in the above entitled cause, to the Amended Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States, within and for the District of Nebraska:

Edgar M. Morsman, one of the defendants in the above entitled cause, answering plaintiff's amended bill of complaint, separately and for himself alone, says:

(1) This defendant admits that it is true that the complainant Sumner Wallace, is a resident and citizen of the State of New Hampshire; that the American National Bank of Omaha, and the Union National Bank of Omaha, defendants herein, are corporations organized under and by virtue of the banking laws of the United States, for the purpose of doing business in the City of Omaha, in the County of Douglas and State of Nebraska, and within the jurisdiction of this Court, as National Banks, and are citizens of said State of Nebraska; that the McCague Investment Company is a corporation organized under and by virtue of the laws of the State of Nebraska, and a citizen and resident of the State of Nebraska; that the National Bank Building Company of America, is a corporation or-
51 ganized under and by virtue of the laws of the State of Nebraska, and a resident and citizen of said state, doing business in the City of Omaha in said State, and within the jurisdiction of this court; that the defendant, William Wallace, is a citizen and resident of the State of Ohio; that the defendant, Anna C. Crowell, is a citizen and resident of the District of Columbia; that the defendant, Robert H. McClellan, is a citizen and resident of the State of Illinois; that the defendant, Royal Wilson, is a citizen and resident of the State of Massachusetts; that the defendant, William Wilson is a citizen and resident of the State of New York; that the defendant, Jacob Wead is a citizen and resident of the State of Illinois; that the defendant, John Spear, is a citizen and resident of the State of Illinois; that the defendant, R. L. Brownlee, is a citizen and resident of the State of Ohio; that the defendant, Caroline Carpenter, is a citizen and resident of the State of Massachusetts; that the defendant Arthur H. Flack, is a citizen and resident of the State of New York; that the defendant Mead C. Williams is a citizen and resident of the State of Illinois; that the defendant, J. H. Hawkins is a citizen and resident of the State of Ohio; that the Manufacturer's National Bank is a corporation organized under and by virtue of the laws of the United States, for the purpose of doing business as a national bank, and is a citizen and resident of the State of Massachusetts; that the defendant Samuel Maxwell is a citizen and resident of the State of New York; that the defendants Elizabeth DuFrene, executrix of the estate of Alfred R. Dufrene, deceased, Thomas H. McCague, Alex. Charlton, Elmer C. Brownlee, Philip Mergin, George G. Wallace, William S. Poppleton, John S. King, Charles F. Manderson, Charles C. George, Peter Frenzer, John N. Frenzer, Charles H. Walworth, Frank W. Wessels, Frank Graham, James H. McCulloch, John R. Charlton, C. W. Morton, James J. Woodward, Viola
52 Coffin, Howard B. Smith, Edward G. Glenn, Emily J. Robinson, James H. Morton, George Morton, Mary E.

Morton, Henry F. Wyman, Albert U. Wyman, F. R. McConnell, Trustee, John E. Patrick, William C. Beer, Marcus C. Acheson, George Marples, James H. Conrad, T. R. Neal, William Baird, John L. McCague, Morris Levy, William L. McCague, Thomas H. McCague, Alex. G. Charlton, Rufus B. Bullock, ... Administrator of the estate of Thomas L. Kimball, deceased, and this defendant, are each citizens and residents of the State of Nebraska.

(2) The defendant denies, and avers that it is not true, that in the year 1894, and until December, 1895, the said Union National Bank of Omaha, and the said American National Bank, by means of their officers and agents, held repeated conferences with respect to the taking over of the business and office and office fixtures of the American National Bank by said Union National Bank, and the terms under which such an arrangement could be consummated, and he denies that numerous meetings were held between the prominent stockholders of the two said banks with that end in view. He admits that it is true that in the month of December, 1895, it became necessary for the American National Bank to provide in some manner for the payment of a large amount of its deposits, on or about January 1st, 1896, and he admits that there was reason at said date to apprehend a demand for the payment of such proportion or amount of deposits then held by the said American National Bank, as the said bank had not, and would not have, cash funds with which to pay; defendant admits that in the month of December, 1895, and for some time prior thereto, said American National Bank was in failing condition and there were negotiations between the officers of the American National Bank and the Union National Bank,
53 for the transfer by the said American National Bank, to the Union National Bank, of the business and assets of the said American National Bank, which negotiations resulted in the agreement in writing referred to in the amended bill of complaint.

(3). This defendant admits that it is true that the amount of deposits held by the said American National Bank of Omaha, at the date of said agreement in December, 1895, was the sum of $193,949.78, but he denies that it is true that the said American National Bank had no more than the sum of $36,979.78 in cash, available to meet the said deposits, and avers, that, in fact, the said American National Bank had in cash and cash items available as cash, about the sum of $49,000.00. Defendant admits that at said time, in the month of December, 1895, negotiations were entered into by and between the officers of the said American National Bank, and

Union National Bank, for a transfer of the business of the said American National Bank to said Union National Bank, and for the payment of the obligations of the said American National Bank, and to provide an opportunity to realize upon its assets, and that as a result of said negotiations, and by and under the direction of the Board of Directors of the American National Bank, a contract in writing was entered into by and between said banks, executed on the part of the American National Bank by Thomas L. Kimball, President, and attested by Henry F. Wyman, Cashier, and executed by and on behalf of the Union National Bank by William W. Marsh, its President, and attested by Charles E. Ford, its Cashier, a copy of which said contract in writing is attached to the amended bill of complaint.

54 (4) The defendant admits that it is true that immediately after the signing of the said agreement, the transfer of the business of the American National Bank was made to the said Union National Bank, pursuant to said agreement, and that said Union National Bank assumed the payment of all of the liabilities of the said American National Bank to its depositors, and on account of its bills payable; but whether or not the said Union National Bank had, prior to the commencement of this suit, paid all of said liabilities in full, this defendant has no knowledge or information, otherwise than that derived from the averments of the bill of complaint, and therefore he denies the same.

(5) It is true that the liabilities of the American National Bank so assumed by the Union National Bank, were composed of sums due to depositors, holders of demand certificates, time certificates, certified checks, cashier's checks, banks and bankers, and bills payable, amounting in the aggregate to the sum of $289,097.30 and it is also true that the said Union National Bank at the same time received from the American National Bank, cash items, cashier's checks and notes, equal to said sum of $289,097.30, as set forth in the plaintiff's amended bill of complaint; and it is also true that the cashier's check for the sum of $39,929.51 so delivered to the said Union National Bank, was paid in the manner and form as set forth in the amended bill of complaint.

(6) It is true that the liabilities of the American National Bank assumed by the Union National Bank in excess of the assets of the American National Bank taken and accepted by the Union National Bank as cash and without recourse on the American National Bank, pursuant to the agreement aforesaid, amounted to the sum of $201,000.00, and immediately after ascertaining under said agreement, the amount of lia-

bilities of the American National Bank so assumed by
55 the Union National Bank in excess of the assets of the American National Bank taken and accepted by the Union National Bank as cash without recourse, and on the 23d day of December, 1895, the said American National Bank, pursuant to the terms of said agreement and in performance thereof, executed to the said Union National Bank, its three promissory notes, each for the sum of $67,000.00 and bearing interest at the rate of six per cent per annum from date, one of said notes maturing in one year, one in two years, and one in three years from the date thereof; but this defendant denies, and says that it is not true that the balance of the assets of the American National Bank, being all of the assets of said bank not taken by the Union National Bank as cash and without recourse, were turned over to Thomas L. Kimball, as trustee of the parties to said agreement, to collect and convert the same into cash, for the uses and purposes expressed in said agreement, and defendant avers that said remaining assets of the American National Bank were then, pursuant to the terms of the said agreement, turned over to the possession and control of the Union National Bank, pursuant to the said agreement.

Defendant denies and says it is not true, that on the 8th day of August, 1898, the Union National Bank sold, assigned and transferred the one of said notes for the sum of $67,000.00, maturing in one year from date, to the complainant, for a valuable consideration, and denies that it is true that the complainant is, and was at the time of the commencement of this suit, the legal owner and holder thereof; but defendant admits that the copy set out in the bill of complaint is a true copy of the note of the American National Bank for the said sum of $67,000.00 first maturing, and that no payments have been
made thereon, save and except those which are thereon
56 indorsed, and which said payments, and the dates thereof, are truly set out in the plaintiff's bill of complaint; but this defendant avers that other sums of money came into the hands of the said The Union National Bank prior to the alleged transfer of said note to the plaintiff, which should have been applied thereon as payments, as hereinafter set forth.

(8) Defendant denies that the defendant Union National Bank is a creditor of the defendant American National Bank, and the owner and holder of the two other notes of the American National Bank for the sum of $67,000.00 each.

(9) Defendant denies and says it is not true, that the stockholders of the American National Bank, including this defendant were advised of the situation and condition of the

American National Bank, and that it was unable to pay its depositors and liabilities at the time of making the agreement and notes referred to in the bill of complaint, and that unless some arrangement was made to procure assistance for said American National Bank, it could not pay its depositors, and that the loss, under such circumstances, would be very great, and the liability of stockholders would be greatly increased.

(10). Defendant denies and says it is not true, that with knowledge of such condition and liability of said American National Bank, the said stockholders and each and every of them, and said corporation, the American National Bank, and this defendant, accepted and received the benefits of such contract and ratified and affirmed the same, and allowed, permitted and induced the said Union National Bank to pay out the said sums of money to the depositors of the American National Bank, and accept the benefits of said agreement and the payments of the same, and he denies and says it is not true,
57 as alleged in the amended bill, that by means of the actions and inducements of the officers and agents of the American National Bank, and by means of the execution of said notes and contracts referred to in the amended bill, made by and with the consent, procurement and inducement of said stockholders, and with the knowledge and consent of the said defendants procured the Union National Bank to advance the money to pay off the aforesaid liabilities of the American National Bank, and procured the said Union National Bank to expend large sums of money to pay off and satisfy said liabilities, and he denies that by means of such contract and notes, the said defendants, and particularly, this answering defendant, procured the said Union National Bank to expend the sum of over $280,000.00, or any other sum, in extinguishing, paying off and settling the obligations of said American National Bank, and he denies, and says it is not true, that he was advised of the negotiations during the time the same were pending and of the purpose and design of such negotiations, and acquiesced in and consented to the same.

(11). Defendant denies, and says it is not true, that at the time of the giving of the note described in the plaintiff's amended bill, the said American National Bank delivered to Thomas L. Kimball, as trustee, certain notes and property, as security to the note set forth in the plaintiff's bill of complaint, and other notes given to the said Union National Bank at the same time; but this defendant admits that at the time of giving said three notes for $67,000.00 each, the said American National Bank did deliver to the Union National Bank, certain notes and property, pursuant to the agreement between the said two

banks referred to in the plaintiff's bill of complaint, and
58 that such notes and property were to be liquidated by
the Union National Bank through the said Thomas L. Kimball, as trustee, and the proceeds thereof applied to the payment of the sum represented by said three promissory notes, amounting in the aggregate, to the sum of $201,000.00, so far as necessary to satisfy said sum.

(12) Defendant denies, and says it is not true, that on the 14th day of January, 1896, the American National Bank went into voluntary liquidation, under the provisions of Section 5220 of the Revised Statutes of the United States; but defendant admits that since said 14th day of January, 1896, the American National Bank has not done any banking business.

(13). Defendant admits that it is true that all of the defendants named in the amended bill as such, were, in fact, shareholders of the American National Bank on the 14th day of January, 1896, and holders and owners of shares set opposite their names in the plaintiff's amended bill of complaint, including this answering defendant as the owner of 75 shares.

(14). Defendant denies that the American National Bank was, during the months of December, 1895, and January, 1896, insolvent and unable to pay its creditors.

(15). Defendant admits that it is true, that under and by virtue of the banking laws of the United States, each shareholder of the American National Bank is held individually responsible, equally and ratably, but not one for another, for all contracts, debts and engagements of said American National Bank, contracted in the ordinary course of its business, to the extent of the amount of his, her, or its stock therein, at the par value thereof, in addition to the amount paid for such shares; but this defendant avers that the plaintiff's claim was
not so contracted, and denies that he is liable for the
59 payment of the claims of any other creditor, or creditors,
or any part thereof, arising out of the said notes, or any of said notes, for the sum of $67,000.00 each, referred to in the amended bill of complaint.

And further answering, this defendant now avers;

(16.) That on the 21st day of December, A. D. 1895, pursuant to a resolution of its Board of Directors adopted at a special meeting of said Board on the date last aforesaid, and which said resolution in terms and so far as the Board of Directors had power, authorized the same, the defendant American National Bank of Omaha, by writing, executed in the name of the said American National Bank of Omaha, by Thomas L. Kim-

ball, who was then its President, and attested by Henry F. Wyman, who was then its Cashier, entered into an agreement in writing, with the defendant The Union National Bank of Omaha, whereby (1) The said The American National Bank of Omaha sold and assigned to the said The Union National Bank of Omaha, the business, the cash on hand, the office furniture and fixtures, belonging to the said The American National Bank of Omaha, and such of the bills receivable belonging to the said The American National Bank of Omaha, as, upon examination thereof, the said The Union National Bank of Omaha, should be willing to accept as cash and without recourse on the said The American National Bank of Omaha; (2) the said The American National Bank of Omaha further agreed to sustain and pay one half of the loss and expense which the said The Union National Bank of Omaha might sustain by reason of its removal from its then place of business, on account of an unexpired lease for the premises then occupied, and one half of the loss which the said Union National Bank of Omaha might sustain on the sale of its own furniture and fixtures, and to guarantee the said The Union National Bank of
60 Omaha against loss on account of assuming the liabilities of the said The American National Bank of Omaha, as provided for in said agreement, and in the execution of such guaranty to execute and deliver to the said The Union National Bank of Omaha, the three promissory notes of the said The American National Bank of Omaha, in equal sums, for the remainder of the amount of the liabilities of the said The American National Bank of Omaha, which the said The Union National Bank of Omaha, should by the terms of said agreement, assume, after deducting therefrom the cash, bills receivable and other assets so sold to and accepted by the said The Union National Bank of Omaha, and which said three promissory notes it was provided by said agreement, should draw interest at the rate of six per cent per annum, become due in one, two and three years from their date, respectively, be non-negotiable, and all become due upon the non-payment of any one at maturity; (3), as further security to the said The Union National Bank of Omaha, the said The American National Bank of Omaha sold and assigned to the said The Union National Bank of Omaha, all of its remaining assets, bills receivable, stocks, bonds, personal property, real estate, rights and interests therein, or liens thereon, subject to the right of Thomas L. Kimball to collect and convert the same into money and apply the money so collected, as trustee for both parties to the said agreement and in consideration of the said agreement on the part of the said The American National Bank of Omaha, the said The Union National Bank of Omaha agreed:

(1) to take the furniture and fixtures so sold by the said The American National Bank of Omaha to it, at the agreed price of $3750.00; (2) to assume all of the liabilities of the said The American National Bank of Omaha to its depositors and on account of its bills payable; (3) to liquidate the re-
61 mainder of the assets of the said The American National Bank of Omaha, after deducting the portions thereof which were to be taken by the said The Union National Bank of Omaha, as aforesaid, as cash, without any charge or expense therefor, excepting such court charges and attorneys fees as might be found necessary; (4) that such liquidation should be conducted under the direction of the said Thomas L. Kimball, or such other person as should be agreed upon, on behalf of the stockholders of the said The American National Bank of Omaha, and that the said Kimball should represent the stockholders of the said The American National Bank of Omaha in such liquidation, and receive, hold and use the proceeds of the assets of the said The American National Bank of Omaha as trustee for the parties to the said agreement, and for the mutual protection of the rights of each, in accordance with the terms of the said agreement, and that all necessary charges and attorney's fees attending such liquidation, should be incurred under the direction of said Thomas L. Kimball, or his successor. A true copy of said agreement is attached hereto and made part hereof, to which this defendant prays leave to refer.

(17). This defendant further avers, that immediately after the execution of the said agreement, and pursuant thereto, the said Thomas L. Kimball and Henry F. Wyman, the President and Cashier respectively, of the defendant The American National Bank of Omaha, and for and on behalf of the said The American National Bank of Omaha, delivered and turned over to the said The Union National Bank of Omaha, all assets of every character then owned by the said The American National Bank of Omaha, and on the 25th day of December, A. D. 1895, the said The Union National Bank of Omaha agreed to accept as cash, and without recourse on the said The
62 American National Bank of Omaha, the cash on hand amounting to the sum of $36,795.78, drafts on Chicago, amounting to the sum of $10,000.00, drafts on St. Louis, amounting to the sum of $284.61, drafts on Boston amounting to the sum of $87.40, and drafts on Philadelphia amounting to the sum of $1,000.00. And it was then ascertained and agreed between the said parties, that the difference between the amount of such assets so accepted by the Union National Bank as cash, and without recourse, and the total amount of liabilities of the American National Bank assumed by the Union National Bank pursuant to said agreement, was the

sum of $240,929.51, and thereupon the said Thomas L. Kimball as President, and Henry F. Wyman, as Cashier, of the said The American National Bank of Omaha, in compliance with the said agreement, and in execution of the guarantee therein, executed and delivered to the said The Union National Bank of Omaha, a Cashier's Check for the sum of $39,929.51, and three promissory notes each for the sum of $67,000.00, said three promissory notes becoming by their terms, due in one, two and three years respectively, and which said Cashier's check for $39.929.51 has been fully paid, and of which said notes the copy which is set out in the plaintiff's bill of complaint is the one first maturing, and which said three promissory notes constitute the only indebtedness of the said The American National Bank of Omaha.

(18) This defendant further avers that the said plaintiff Sumner Wallace, has not reduced his said claim founded upon the promissory note set out in the amended bill of complaint, to judgment against the American National Bank of Omaha, in any court; that the assets of the said The American National Bank of Omaha, turned over and delivered to The Union National Bank of Omaha as aforesaid, not including any
63 sum for the business or good will, amounted, at their nominal or face value, to the sum of $539,828.33 and that of said assets there now remain in the hands of the said The Union National Bank of Omaha, assets of the nominal or face value of $371,765.00, which have not been in any manner liquidated or exhausted for the satisfaction of the plaintiff's said claim, or any of the said promissory notes of $67,000.00 each; that in the process of liquidating the remainder of said assets, The Union National Bank of Omaha, and said Thomas L. Kimball, former trustee have wrongfully charged the trust fund aforesaid with the sum of $4,639.96, on account of expense for salaries paid for the service of clerks and assistants, and the further sum of $544.17 on account of expense for advertising and other large sums, all incurred in the execution of said trust, and in the liquidation of such assets, which will more fully appear by reference to the answer and report of said Thomas L. Kimball, former trustee, filed herein. And this defendant now avers, that by the terms of the agreement aforesaid the said The Union National Bank of Omaha, was bound to assume and pay all such expense of liquidation, and this defendant therefore avers that in taking an account of the amount due on said note, copy of which is set forth in the plaintiff's bill, if such account be taken by or under the direction of the court, the said several sums so wrongfully charged to the trust fund should be credited as payments on said note as of the proper date, which date this defendant is unable to more specifically set forth.

This defendant now avers that the agreement referred to in complainant's amended bill and hereinbefore referred to, and the three promissory notes aforesaid for the sum of
64 $67,000.00 each, were ultra vires and void acts of the said The American National Bank of Omaha, and were not entered into in the ordinary course of its business, and create no obligation for which this defendant is as a stockholder responsible.

Wherefore, this defendant prays that the plaintiff's bill of complaint be dismissed, and that he have judgment for his costs.

W. W. MORSMAN,
Counsel and Solicitor for E. M. Morsman.

Agreement.

This Indenture Witnesseth: That the American National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the first part, has and by these presents does hereby agree for the considerations hereinafter expressed to and with the Union National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the second part as follows, to-wit:

First: The party of the first part hereby agrees to sell and assign, and does hereby sell and assign to the party of the second part the business of the party of the first part, its cash on hand, office furniture and fixtures and such of its bills receivable as the party of the second part on examination may be willing to take as cash without recourse on the party of the first part.

Second: The party of the second part hereby agrees to purchase and does hereby purchase from the party of the first part the business of the party of the first part, cash on hand, office furniture and fixtures, and such bills receivable as the party of the second part may be willing to take as cash on examination of the same without re-
65 course on the party of the first part and to pay the party of the first part for said office furniture and fixtures the sum of Three Thousand Seven Hundred and Fifty Dollars ($3,750) and to assume the liabilities of the party of the first part to its depositors and on account of its bills payable and to liquidate the remaining assets of the party of the first part which may not be taken and received as cash by the party of the second part without charge or expense to the party of the first, except such court charges and attorney's fees as may be found necessary, and that such

liquidation shall be conducted under the direction of Thomas L. Kimball or such other person as may be agreed upon on behalf of the stockholders of the party of the first part, it being understood and agreed that said Kimball or his successor shall represent in said liquidation the stockholders of the party of the first part and shall receive, hold and use the proceeds of the assets of the party of the first part as trustee of the parties hereto for the mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary court charges and attorney's fees attending said liquidation shall be incurred under the direction of the said Kimball, or his successor.

Third: In consideration of the above agreement of the party of the second part, the party of the first part hereby agrees to sustain and pay one half of the loss and expense which the party of the second part may sustain on account of removal from its present quarters by reason of its unexpired lease on its present place of business, and one half of the loss which the party of the second part may sustain on the sale of its 66 office furniture and fixtures, which furniture and fixtures are agreed upon at the present price and value of Three Thousand Seven Hundred and Fifty Dollars ($3,750) and the party of the first part further agrees to guarantee and does hereby guarantee the party of the second part against any and all loss on account of assuming the liabilities of the party of the first part as aforesaid.

And to this end the party of the first part agrees to execute and deliver to the party of the second part its three promissory notes of equal sums for the amount of liabilities, which the party of the second part may assume after crediting the full amount of cash on hand and bills receivable and other assets which may be accepted by the party of the second part on examination, which notes shall draw interest from date at the rate of six per cent per annum, payable quarter-annually, and be payable in one, two and three years from date respectively, and shall be non-negotiable. And in case of nonpayment of any of said notes when due, the whole of said principal sums of all of said notes and accrued interest shall thereupon become due. And as further security to the party of the second part, the party of the first part agrees to sell and assign and does hereby sell and assign to the party of the second part all of its assets which may remain after the selection therefrom by the party of the second part heretofore mentioned, including all its bills receivable, stocks, bonds, personal property of every kind and all real estate and rights and interests therein or liens thereon, with the understanding

and agreement that the party of the second part shall have and hold said assets and properties subject to the right of the said Thomas L. Kimball, or his successor, to collect and convert the same into cash for the use and purposes hereinbefore expressed.

67 And it is further agreed that the party of the first part may pay and have credited on said notes at any time prior to maturity any sums of money of Five Hundred Dollars ($500) and upwards, provided the sums so paid shall be in even hundreds.

Witness the names and corporate seals of the parties hereto this 21st day of December, A. D. 1895.

THE AMERICAN NATIONAL BANK OF OMAHA,

Attest: By Thos. F. Kimball, President.
Henry F. Wyman, Cashier.

UNION NATIONAL BANK OF OMAHA,

Attest: By Wm. W. Marsh, President,
Chas. E. Ford. Cashier.

Endorsed: Filed Jan. 24, 1901. Geo. H. Thummel, Clerk.

68 Thereupon afterwards, to-wit:—On the 4th day of February, 1901 The Joint and Several Answer of Charles C. George, Henry F. Wyman, Albert U. Wyman and Morris Levy was filed in said case, which said Answer is in words and figures following, to-wit:—

In the Circuit Court of the United States for the District of Nebraska.

Sumner Wallace, Plaintiff,
Doc. "T". No. 261 vs. In Equity.
The American National Bank, et al., Defendants.

The joint and several answer of Charles C. George, Henry F. Wyman, Albert U. Wyman, and Morris Levy, four of the defendants, to the amended Bill of Complaint of Sumner Wallace.

These defendants respectively, now and at all times hereafter reserving to themselves all right of exception to said complainant's said amended Bill of Complaint, for answer thereto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, say:

That they severally admit that the American National Bank and the Union National Bank are corporations organized under and by virtue of the banking laws of the United States for the purpose of doing business in the City of Omaha, Douglas County, Nebraska; deny that said banks are within the jurisdiction of the Circuit Court of the United States within and for the District of Nebraska as national banks; admit that each of these answering defendants is a resident and citizen of the State of Nebraska; admit that the plaintiff is a
69 resident and citizen of the state therein set forth; and admit that all of the parties were at the time of the filing of the bill in this cause, and still are, residents and citizens as in said amended bill averred, except Alfred R. Dufrene and Thomas L. Kimball, who have since deceased, and James J. Brown, Jr., who died before said original bill was filed.

And these defendants further severally answering say, that they deny that it is true that in the year of 1894, until December, 1895, the said Union National Bank and the said American National Bank by means of their officers and agents held repeated conferences with respect to the taking over of the business and office fixtures of the American National Bank by said Union National Bank and the terms under which the said arrangement could be consummated, and deny that numerous meetings were held between the prominent stockholders of the two said banks with that end in view.

And these defendants further severally answering say, that they deny that in the month of December 1895, the American National Bank aforesaid was in such a financial condition that it became necessary for it to provide in some manner for the payment of a large amount of its deposits on or about January 1st, 1896, but admit that said bank was in such a financial condition that upon certain contingencies arising it might have become necessary for it to provide in some manner for the payment of a large amount of its deposits on or about Jan. 1, 1896; and deny that it did not have on hand sufficient funds with which to meet demands which it knew would be made upon it at that time, but admit that it did not have on hands sufficient funds with which to meet the demands which it knew would be made upon it at that time, in the event such contingencies did arise.

70 And these defendants further severally answering say, that they have been informed and believe it to be true, that the amount of deposits at said time, and for which the bank was liable upon call, was the sum of $193,949.78, but deny it to be true that the amount of available cash to meet the same was only the sum of $36,979.78, and say that they

have been informed and believe and aver it to be true that the amount of available cash and items equivalent to cash was about the sum of $49,000.00.

And these defendants further severally answering say, that they have been informed and believe it to be true that negotiations were then (to-wit, in December, 1895) entered into by certain officers of the bank, (to-wit: the American National Bank) with the Union National Bank of Omaha, Nebraska, for a transfer of the business of the said American National Bank to the said Union National Bank, and to ascertain whether or not some arrangement could be entered into whereby the immediate obligations of the American National Bank should be paid.

These defendants further severally answering say, that they have been informed and believe it to be true, that as a result of the negotiations mentioned above and by and under the direction of the Board of Directors of the said American National Bank, as hereinafter more fully set forth, and the Board of Directors of the said Union National Bank, the name of the American National Bank was affixed to an instrument, purporting to be a contract between said banks, by Thomas L. Kimball, who was then president of the American National Bank, and attested by the defendant Henry F. Wyman, who was then cashier of the said American National Bank, and was signed by William W. Marsh, President, and attested by Charles E. Ford, cashier respectively of said Union Na-
71 tional Bank; and believe that a copy thereof is attached to said amended bill; but these defendants for greater certainty therein pray leave to refer to said writing when the same shall be produced.

And these defendants further severally answering say, that they had been informed and believe it to be true, that immediately after the signing of said agreement the transfer of the business of the said American National Bank was made to the said Union National Bank, pursuant to said agreement, and that the said Union National Bank at once assumed the payment of all the liabilities of the said American National Bank to its depositors and on account of its bills payable, but further say that they do not know and have not been informed save by the said complainant's said amended bill, whether or not the said Union National Bank long prior to the commencement of this action has paid all of such deposits in full, and therefore deny that it has.

And these defendants further severally answering say, that they do not know and can not set forth as to their belief or otherwise whether the items of liabilities alleged in said

amended bill to have been assumed by the Union National Bank and the items in cash, drafts and notes alleged to have been received by the Union National Bank from the American National Bank are fully and truly set forth therein, and whether or not a cashier's check of $39,929.51 was received by said Union National Bank from said American National Bank and whether or not the same was paid by turning over to the said Union National Bank notes for $22,299.10 and a cashier's check for $17,000.00, and whether or not the same was afterwards paid by the American National Bank, but admit that a cashier's check for some amount was received by said Union National Bank from said American National Bank which check was paid by turning over to the said Union National Bank notes for an amount unknown to these respondents and a cashier's check for an amount unknown to these defendants, which check was afterwards paid by the American National Bank.

72 These defendants further severally answering say, that they deny that the liabilities of the said American National Bank assumed by the said Union National Bank in excess of the assets of the said American National Bank taken and accepted by the Union National Bank as cash and without recourse, pursuant to the alleged agreement therein set forth, amounted to the sum of $201,000.00.

And these defendants further severally answering say, that they deny that the American National Bank executed and delivered to the Union National Bank the three notes mentioned in said amended bill but further say, that they have been informed and believe it to be true, that on the 23rd day of December, 1895, the said Thomas L. Kimball, who was then president of said American National Bank, executed and delivered to said Union National Bank three promissory notes in the name of the American National Bank as maker, each of said notes being for the sum of $67,000.00 and bearing interest at the rate of six per cent per annum from date, one of said notes maturing in one year from its date, one in two years from its date and one in three years from its date.

And these defendants further severally answering say, that they deny that the balance of the assets of the said American National Bank, being all of the assets of the said American National Bank not taken by the said Union National Bank as cash and without recourse and in pursuance to and in performance of said agreement, were turned over to one Thomas L. Kimball as trustee of the parties to said agreement to collect and convert the same into cash for the uses and pur-

poses expressed in said agreement, but say that the balance of the assets of said American National Bank were
73 turned over to said Union National Bank pursuant to the terms of said agreement to liquidate the same.

And these defendants further severally answering say that they do not know and have not been informed save by said complainant's said amended bill and cannot set forth as to their belief or otherwise, whether on the 8th day of August 1898 the said Union National Bank sold, assigned and transferred said note due in one year from date to said plaintiff for a valuable consideration and whether or not said plaintiff is and was at the commencement of this action the legal owner and holder thereof, and whether or not a copy of said note with endorsements thereon is fully set forth in said amended bill, and therefore deny the same.

These defendants further severally answering say, that they deny on information and belief that there is now due and owing on said note to said plaintiff from the American National Bank the sum of $———— or any sum whatsoever, and also deny on information and belief that the Union Natianal Bank is a creditor of said American National Bank and that said Union National Bank is still the owner and holder of the two other notes in said amended bill described.

And these defendants further severally answering say, that they admit that they were advised of the situation and condition of the said American National Bank and of its possible and contingent inability to pay its depositors and liabilities at the time of the making of the agreement and notes set out in said amended bill, and admit that, if such contingencies had arisen, unless some arrangement was made to procure assistance for said American National Bank, the said bank could not pay its depositors immediately and that the loss under such circumstances would be very great; but deny that the liability of the stockholders would be greatly increased.

74 And these defendants further severally answering say, that it is not true and they deny that they or either of them had any knowledge of the condition and liability of said American National Bank, as alleged in said bill, and that it is not true and they deny that they or either of them accepted and received the benefits of such contract and ratified and affirmed the same, and that it is not true and they deny that they or either of them, except as hereinafter set forth, allowed and permitted the Union National Bank to pay out the said sums of money alleged in said amended bill to have been

paid by the Union National Bank to the depositors of said American National Bank, and that it is not true and they deny that they or either of them induced the Union National Bank to pay out the said sums of money alleged in said amended bill to have been paid by the Union National Bank to the depositors of the said American National Bank, and that it is not true and they deny that they or either of them accepted the benefits of said agreement and the payments of the same.

And these defendants further severally answering say, that it is not true and they deny it to be a fact that by means of the actions and inducements of the officers and agents of the American National Bank and by means of the execution of said notes and contract alleged in said amended bill to have been made by and with the consent, procurement and inducement of the said stockholders (which consent, procurement and inducement these defendants deny), the defendants herein, or these defendants or either of them, and with the knowledge and consent of the said defendants or of these defendants or either of them, procured the Union National Bank to advance the money to pay off the liabilities of the American National Bank and procured the Union National Bank to expend large sums of money to pay off and satisfy said liabilities of
75 said American National Bank, and further say that it is not true and they deny it to be a fact that by means of such contract and notes the said defendants or either of them procured the said Union National Bank to expend the sum of $280,000.00 or any sum whatsoever in extinguishing, paying off and settling the obligations of the said American National Bank.

These defendants further severally answering say, that it is not a fact, and they deny it to be a fact, that these defendants or either of them was advised of the negotiations during the time the same were pending, except as aforesaid, and the purpose and design of such negotiations and acquiesced in the same and consented thereto, except as aforesaid.

And these defendants further severally answering say, that they deny that at the time of the giving of the notes described in said amended bill the said American National Bank delivered to said Thomas L. Kimball, as trustee, certain notes and property as security to the notes sued on therein and other notes given to the said Union National Bank at the same time, and that said trustee was to collect said security and apply the proceeds thereof to the payment of said notes, but admit that certain notes and property were at or about that time turned over to the Union National Bank to be liquidated and applied to the payment of said notes.

And these defendants further severally answering say, that they admit that said Thomas L. Kimball, has since the commencement of this suit deceased, but respectfully say that this court did not have any jurisdiction or authority to appoint James Burness as successor to said Thomas L. Kimball as trustee under said alleged contract, and further say that they do not know and have not been informed save by the
76 said complainant's said amended bill and cannot set forth as to their belief or otherwise, whether such assets have in fact all been turned over to said Burness.

And these defendants further severally answering say, that they deny on information and belief that the American National Bank on the 14th day of January, 1896, or at any other time, went into voluntary liquidation under the provisions of Sec. 5220 of the Revised Statutes of the United States, but admit on information and belief that since said time the said corporation, the American National Bank, has not done any banking business.

And these defendants further severally answering say, that they deny that said plaintiff is a creditor of the said American National Bank.

And these defendants further severally answering say, that they admit that the said American National Bank was capitalized for the sum of $200,000.00 divided into shares of $100.00 each, making in all 2000 shares of stock issued by the said bank.

And these defendants further severally answering say, that they do not know and have not been informed save by the said complainant's said amended bill, and cannot set forth as to their belief or otherwise, whether the said plaintiff has or has not made defendants in this action all of the shareholders of said American National Bank in so far as he has been able to ascertain the names thereof, but for the purposes of this action admit that he has.

And these defendants further severally answering say, that they admit that the said Charles C. George, Henry F. Wyman, Albert U. Wyman, and Morris Levy were at the times mentioned in said amended bill and still are shareholders of the said American National Bank to the number respectively of fifteen and fifty-eight & one-fourth and ten and fifty shares, as stated in said amended bill.

77 And these defendants further severally answering say, that they admit on information and belief that the other defendants named in said amended bill were the owners and holders of the number of shares set opposite their names respectively therein.

And these defendants further severally answering say, that it is not true and they deny that the said American National Bank at the time it is alleged it went into voluntary liquidation and during the months of December, 1895, and January, 1896, and for a long time prior thereto, was wholly insolvent and unable to pay its creditors, and that said American National Bank has ever since remained and still is wholly insolvent and unable to pay its creditors.

And these defendants further severally answering say, that they deny that this action is brought against the said American National Bank and its stockholders jointly under and through any authority granted by the laws of the United States relating to banking.

These defendants further severally answering say, that they admit that under and by virtue of the banking laws of the United States, each and every of said shareholders is held individually responsible equally and ratably, and not one for another, for all contracts, debts and engagements of the said American National Bank to the extent of the amount of his, her or its stock therein, at the par value thereof, in addition to the amount invested in such shares; but aver that such indebtedness or liability is limited to valid contracts, debts and engagements incurred and entered into by said bank in the usual and ordinary course of the business of banking; and deny that each and every or any of the stockholders of the said American National Bank, and each and every or any of
78 the respondents named in said amended bill as stockholders, are liable for the payment of the claim of plaintiff and of the claim of the said Union National Bank to the amount of stock so held by said defendants or to any other amount or to any extent whatsoever.

And these defendants further severally answering say, that the Articles of Association of the defendant, the American National Bank of Omaha, provided that the Board of Directors of said bank should have authority to elect a President, Vice-President and such other officers and clerks as might be required to transact the business of such Association, to fix the salaries of such officers and clerks, to dismiss such officers and clerks, to define the duties of such officers and clerks, and "generally, to do and perform all the acts that may be legal for a Board of Directors to do under the Revised Statutes aforesaid", to-wit: the Revised Statutes of the United States.

That section 14 of the By-Laws of said defendant, the American National Bank of Omaha, provided that special meetings

of the Board of Directors might "be called by the President, Cashier or at the request of three or more directors."

That at a regular annual meeting of the stockholders of said defendant, the American National Bank of Omaha, held January 8, 1895, nine persons were elected to serve as directors of said bank in accordance with the Articles of Association and By-laws of said bank.

That at a special meeting of the directors of said defendant, the American National Bank of Omaha, held on the 21st day of December, 1895, at which meeting there were present six out of the nine directors of said Association and of
79 which special meeting no notice had been given to the three directors not present, the following resolution was moved, seconded, and unanimously adopted, to-wit:

"Whereas, the officers of this bank and the officers of the Union National Bank of Omaha, Nebraska, have negotiated and agreed upon the sale of this bank to the Union National Bank of the business and assets of this bank on the terms and conditions embodied in the agreement, of which the following is a copy:

Agreement:

This indenture witnesseth. That the American National Bank a corporation of Omaha, Nebraska, hereinafter designated party of the first part, has and by these presents does hereby agree, for the considerations hereinafter expressed, to and with Union National Bank, a corporation, of Omaha, Nebraska, hereinafter designated party of the second part, as follows, to-wit:

First: The party of the first part hereby agrees to sell and assign and does hereby sell and assign to the second party the business of the party of the first part, its cash on hand, office furniture and fixtures and such of its bills receivable as the party of the second part on examination may be willing to take as cash without recourse on the party of the first part.

Second: The party of the second part hereby agrees to purchase and does purchase from the party of the first part the business of the party of the first part, cash on hand, office furniture and fixtures, and such bills receivable as the party of the second part may be willing to take as cash on examination of the same without recourse on the party of the first part and to pay the party of the first part for said office fur-
80 niture and fixtures the sum of Three Thousand Seven Hundred and Fifty ($3,750.00), and to assume the lia-

bilities of the party of the first part to its depositors and on account of its bills payable and to liquidate the remaining assets of the party of the first part which may not be taken and received as cash by the party of the second part without charge or expense to the party of the first part, except such court charges and attorneys' fees as may be found necessary and that such liquidation shall be conducted under the direction of Thomas L. Kimball or such other person as may be agreed upon on behalf of the stockholders of the party of the first part, it being understood and agreed that said Kimball or his successor shall represent in said liquidation the stockholders of the party of the first part, and shall receive, hold and use the proceeds of the assets of the party of the first part as trustee of the parties hereto for the mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary court be incurred under the direction of the said Kimball, or his charges and attorneys' fees attending said liquidation shall successor.

Third: In consideration of the above agreement of the party of the second part, the party of the first part hereby agrees to sustain and pay one half of the loss and expense which the party of the second part may sustain on account of removal from its present quarters by reason of its unexpired lease on its present place of business and one half of the loss which the party of the second part may sustain on the sale of its office furniture and fixtures, which furniture and fixtures are agreed upon at the present price and value of Three Thousand Seven Hundred and Fifty ($3750.00) Dollars, and the party of the first part further agrees to guarantee and does hereby guarantee the party of the second part against any and
81 all loss on account of assuming the liabilities of the party of the first part as aforesaid. And to this end the party of the first part agrees to execute and deliver to the party of the second part its three promissory notes of equal sums for the amount of liabilities which the party of the second part may assume after crediting the full amount of cash on hand and bills receivable and other assets which may be accepted by the party of the second part on examination, which notes shall draw interest from date at the rate of six per cent per annum, payable quarter annually, and be payable in one, two and three years from date respectively, and shall be non-negotiable. And in case of non-payment of any of said notes when due the whole of said principal sums of all of said notes and accrued interest shall thereupon become due.

And as further security to the party of the second part the party of the first part agrees to sell and assign and does hereby sell and assign to the party of the second part all of its assets which may remain after the selection therefrom by the party of the second part heretofore mentioned, including all its bills receivable, stocks, bonds, personal property of every kind and all real estate and interests therein or liens thereon, with the understanding and agreement that the party of the second part shall have and hold said assets and properties subject to the right of said Thomas L. Kimball, or his successor, to collect and convert the same into cash for the uses and purposes hereinbefore expressed.

And it is further agreed that the party of the first part may pay and have credited on said notes at any time prior
82 to maturity any sums of money of Five Hundred ($500.00) Dollars, and upwards, provided the sums so paid shall be in even hundreds.

Witness the names and corporate seals of the parties hereto this 21st day of December, A. D. 1895.

Now therefore, resolved that the foregoing agreement be and the same is hereby ratified and confirmed and that the officers of the bank be and are hereby authorized and directed to execute said agreement and carry the same into effect for and on behalf of this bank, and that the officers of this bank be and are hereby authorized to execute and deliver to the Union National Bank the notes of this bank in the sums which may be required to comply with the terms of the foregoing agreement."

That thereupon on said 21st day of December, the said Thomas L. Kimball, who was then president of said American National Bank, entered into an agreement in the name of said American National Bank of Omaha with the defendant, the Union National Bank of Omaha, and which agreement was attested by the defendant, Henry F. Wyman, who was then the cashier of said American National Bank, a copy of which is, as these defendants are informed and believe, attached to plaintiff's amended bill as "Exhibit A", and these defendants for greater certainty therein pray leave to refer to the original thereof, when the same shall be produced.

That immediately after the execution and delivery of said agreement and pursuant thereto, and to said resolution, said Thomas L. Kimball and Henry F. Wyman delivered and turned over to said Union National Bank all of the assets then owned by said American National Bank and that said Union National Bank and said Thomas L. Kimball, thereupon took

complete and exclusive possession and control of such assets and proceeded to and did reduce certain portions thereof (but
what and how much are unknown to these defendants)
83 to cash; that whatever payments have been made upon
any of the three notes mentioned in said amended Bill of Complaint have been made out of such assets so transferred and delivered; and that the assets of the American National Bank so turned over and delivered to the said Union National Bank, not including the business, cash on hand, office furniture and fixtures and bills receivable accepted by the said Union National Bank as cash, were of the nominal or face value of about $400,000.00, and of these assets there remained in the hands of the said Union National Bank and said Thomas L. Kimball up to the time of his death and now remain in the hands of said Union National Bank and said James Burness assets of the nominal or face value of about the sum of $371,000.00, which have not been liquidated or converted into money or in any manner applied upon the plaintiff's said claim.

That immediately after the execution and delivery of said instrument, said Union National Bank of Omaha removed from its former place of business, to-wit: on the southeast corner of 16th and Dodge Streets in the City of Omaha, to the place of business of the American National Bank, to-wit: on the northwest corner of 15th and Dodge Streets in said city, and took possession of and has ever since retained possession of the office furniture and fixtures of said American National Bank and its said place of business, leaving its own office furniture and fixtures in the place of business theretofore occupied by it and by its removal left vacant for a long time thereafter, and that said office furniture and fixtures of said Union National Bank were not as valuable as said office furniture and fixtures
of said American National Bank.

84 That afterwards, on the 25th day of December, 1895,
the said defendant, Thomas L. Kimball, who was then president of said American National Bank, executed and delivered to the said Union National Bank, three promissory notes in the name of the said American National Bank, as maker, for the sum of $67,000.00 each, due in one, two and three years respectively, and of which said three notes the note set out in plaintiff's amended bill is the one first maturing.

That at the times mentioned in said amended bill and at the time herein mentioned there were and still are persons, other than said Union National Bank and said plaintiff, who were and still are creditors of said American National Bank.

And these defendants further severally answering say, that no proceedings have been had at law upon the three notes

above mentioned or either of them and that said plaintiff has not reduced his said claim founded upon the note set out in his amended bill to judgment in any court.

And these defendants further severally answering say, that they are informed and believe it to be true, and therefor, aver that by reason of the facts hereinbefore set forth these defendants are not and cannot be held liable under the laws of the United States for the payment of said notes or any portion thereof.

Wherefore, these defendants severally humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

Howard B. Smith,
Of Counsel.

CHARLES C. GEORGE,
HENRY F. WYMAN,
ALBERT U. WYMAN, and
MORRIS LEVY,
By Howard B. Smith,
Their Solicitor.

Indorsed: Filed Feb. 4, 1901, Geo. H. Thummel, Clerk.

85 Thereupon afterwards, to-wit: On the 4th day of February, 1901, Joint and Several Answer of Elmer C. Brownlee, Peter Frenzer, John N. Frenzer, Howard B. Smith and George G. Wallace, was filed in said case, which said Answer is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

Sumner Wallace, Plaintiff,
Doc. "T". vs. No. 261. In Equity.
The American National Bank, et al., Defendants.

The joint and several answer of Elmer C. Brownlee, Peter Frenzer, John N. Frenzer, and Howard B. Smith and George G. Wallace, five of the defendants, to the amended bill of Complaint of Sumner Wallace.

These defendants respectively, now and at all times hereafter reserving to themselves all right of exception to said complainant's said amended Bill of Complaint, for answer thereto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, say:

That they severally admit that the American National Bank and the Union National Bank are corporations organized under

and by virtue of the banking laws of the United States for the purpose of doing business in the City of Omaha, Douglas County, Nebraska; deny that said banks are within the jurisdiction of the Circuit Court of the United States within and for the District of Nebraska as national banks; admit that each of these answering defendants is a resident and citizen
86 of the State of Nebraska; admit that the plaintiff is a resident and citizen of the state therein set forth; and admit that all of the parties were at the time of the filing of the bill in this cause, and still are, residents and citizens as in said amended bill averred, except Alfred R. Dufrene and Thomas L. Kimball, who have since deceased, and James J. Brown, Jr., who died before said original bill was filed.

And these defendants further severally answering say, that they deny that it is true that in the year of 1894, until December, 1895, the said Union National Bank and the said American National Bank by means of their officers and agents held repeated conferences with respect to the taking over of the business and office fixtures of the American National Bank by said Union National Bank and the terms under which the said arrangement could be consummated, and deny that numerous meetings were held between the prominent stockholders of the two said banks with that end in view.

And these defendants further severally answering say, that they deny that in the month of December, 1895, the American National Bank aforesaid was in such a financial condition that it became necessary for it to provide in some manner for the payment of a large amount of its deposits on or about January 1st, 1896, and deny that it did not have on hand sufficient funds with which to meet the demands which it knew would be made upon it at that time.

87 And these defendants further severally answering say, that they have been informed and believe it to be true, that the amount of deposits at said time, and for which the bank was liable upon call, was the sum of $193,949.78, but deny it to be true that the amount of available cash to meet the same was only the sum of $36,979.78, and say that they have been informed and believe and aver it to be true that the amount of available cash and items equivalent to cash was about the sum of $49,000.00.

And these defendants further severally answering say, that they have been informed and believe it to be true that negotiations were then (to-wit, in December, 1895) entered into by the officers of the bank, (to-wit: the American National Bank) with the Union National Bank of Omaha, Nebraska; for a transfer of the business of the said American National Bank

to the said Union National Bank, and to ascertain whether or not some arrangement could be entered into whereby the immediate obligations of the American National Bank should be paid.

These defendants further severally answering say, that they have been informed and believe it to be true, that as a result of the negotiations mentioned above and by and under the direction of the Board of Directors of the said American National Bank, as hereinafter more fully set forth, and the Board of Directors of the said Union National Bank, the name of the American National Bank was affixed to an instrument, purporting to be a contract between said banks, by Thomas L. Kimball, who was then president of the American National Bank, and attested by the defendant Henry F. Wyman, who was then cashier of the said American National Bank, and was signed by William W. Marsh, President, and attested by Charles E. Ford, cashier respectively of said Union Na-
88 tional Bank; and believe that a copy thereof is attached to said amended bill; but these defendants for greater certainty therein pray leave to refer to said writing when then same shall be produced.

And these defendants further severally answering say, that they have been informed and believe it to be true, that immediately after the signing of said agreement the transfer of the business of the said American National Bank was made to the said Union National Bank, pursuant to said agreement, and that the said Union Naional Bank at once assumed the payment of all the liabilities of the said American National Bank to its depositors and on account of its bills payable, but further say that they do not know and have not been informed save by the said complainant's said amended bill, whether or not the said Union National Bank long prior to the commencement of this action has paid all of such deposits in full, and therefore deny that it has.

And these defendants further severally answering say, that they do not know and have not been informed save by said complainant's said amended bill and cannot set forth as to their belief or otherwise whether the items of liabilities alleged in said amended bill to have been assumed by the Union National Bank and the items in cash, drafts and notes alleged to have been received by the Union National Bank from the American National Bank are fully and truly set forth therein, and whether or not a cashier's check of $39,929.51 was received by said Union National Bank from said American National Bank and whether or not the same was paid by turning over to the said Union National Bank notes for $22,299.10 and a

cashier's check for $17,000.00 and whether or not the same was afterwards paid by the American National Bank.

89 These defendants further severally answering say, that they deny that the liabilities of the said American National Bank assumed by the said Union National Bank in excess of the assets of the said American National Bank taken and accepted by the Union National Bank as cash and without recourse, pursuant to the alleged agreement therein set forth, amounted to the sum of $201,000.00.

And these defendants further severally answering say, that they deny that the American National Bank executed and delivered to the Union National Bank the three notes mentioned in said amended bill but further say, that they have been informed and believe it to be true, that on the 23rd day of December, 1895, the said Thomas L. Kimball, who was then president of said American National Bank, executed and delivered to said Union National Bank three promissory notes in the name of the American National Bank as maker, each of said notes being for the sum of $67,000.00 and bearing interest at the rate of six per cent per annum from date, one of said notes maturing in one year from its date, one in two years from its date and one in three years from its date.

And these defendants further severally answering say, that they deny that the balance of the assets of the said American National Bank, being all of the assets of the said American National Bank not taken by the said Union National Bank as cash and without recourse and in pursuance to and in performace of said agreement, were turned over to one Thomas L. Kimball as trustee of the parties to said agreement to collect and convert the same into cash for the uses and purposes expressed in said agreement, but say that the balance of the assets of said American National Bank were turned over to
90 said Union National Bank pursuant to the terms of said agreement to liquidate the same.

And these defendants further severally answering say that they do not know and have not been informed save by said complainant's said amended bill and cannot set forth as to their belief or otherwise, whether on the 8th day of August 1898 the said Union National Bank sold, assigned and transferred said note due in one year from date to said plaintiff for a valuable consideration and whether or not said plaintiff is and was at the commencement of this action the legal owner and holder thereof, and whether or not a copy of said note with endorsements thereon is fully set forth in said amended bill, and therefore deny the same.

These defendants further severally answering say, that they deny on information and belief that there is now due and owing on said note to said plaintiff from the American National Bank the sum of $..... or any sum whatsoever, and also deny on information and belief that the Union National Bank is a creditor of said American National Bank and that said Union National Bank is still the owner and holder of the two other notes in said amended bill described.

And these defendants further severally answering say, that it is not true and they deny that these defendants were or either of them was advised of the situation and condition of the said American National Bank with respect to its alleged inability to pay its depositors and liabilities at the time of the making the agreement and notes set out in said amended bill and that it is not true and they deny that unless some arrangement was made to procure assistance for said American National Bank the said Bank could not pay its depositors and that the loss under such circumstances would be very great, and that the liability of the stockholders would be greatly increased.

91 And these defendants further severally answering say, that it is not true and they deny that they or either of them had any knowledge of the alleged conditions and liability of said American National Bank, and that it is not true and they deny that they or either of them accepted and received the benefits of such contract and ratified and affirmed the same, and that it is not true and they deny that they or either of them allowed, permitted and induced the Union National Bank to pay out the said sums of money alleged in said amended bill to have been paid by the Union National Bank to the depositors of said American National Bank, and that it is not true and they deny that they or either of them accepted the benefits of said agreement and the payments of the same.

These defendants further severally answering say, that it is not true and they deny it to be a fact, that by means of the actions and inducements of the officers and agents of the American National Bank (if any such there were, which they deny) and by means of the execution of said notes and contract alleged in said amended bill to have been made by and with the consent, procurement and inducement of the said stockholders (which consent, procurement and inducement these defendants deny), the defendants herein, or these defendants or either of them, and with the knowledge and consent of the said defendants, or of these defendants or either of them, procured the Union National Bank to advance the

money to pay off the liabilities of the American National Bank and procured the Union National Bank to expend large sums
of money to pay off and satisfy said liabilities of said
92 American National Bank, and further say that it is not
true and they deny it to be a fact that by means of such contract and notes the said defendants or either of them procured the said Union National Bank to expend the sum of over $280,000.00 or any sum whatsoever in extinguishing, paying off or settling the obligations of the said American National Bank.

And these defendants further severally answering say, that it is not a fact and they deny it to be a fact, that these defendants were or either of them was advised of the negotiations during the time the same were pending, and the purpose and design of such negotiations and acquiesced in the same and consented thereto.

And these defendants further severally answering say, that they deny that at the time of the giving of the notes described in said amended bill the said American National Bank delivered to said Thomas L. Kimball, as trustee, certain notes and property as security to the notes sued on therein and other notes given to the said Union National Bank at the same time, and that said trustee was to collect said security and apply the proceeds thereof to the payment of said notes, but admit that certain notes and property were at or about that time turned over to the Union National Bank to be liquidated and applied to the payment of said notes.

And these defendants further severally answering say, that they admit that said Thomas L. Kimball has since the commencement of this suit deceased, but respectfully say that this court did not have any jurisdiction or authority to appoint James Burness as successor to said Thomas L. Kimball as trustee under said alleged contract, and further say that they
do not know and have not been informed save by the
93 said complainant's said amended bill and cannot set
forth as to their belief or otherwise, whether such assets have in fact all been turned over to said Burness.

And these defendants further severally answering say, that they deny on information and belief that the American National Bank on the 14th day of January, 1896, or at any other time, went into voluntary liquidation under the provisions of Sec. 5220 of the Revised Statutes of the United States, but admit on information and belief that since said time the said corporation, the American National Bank, has not done any banking business.

And these defendants further severally answering say, that they deny that said plaintiff is a creditor of the said American National Bank.

And these defendants further severally answering say, that they admit that the said American National Bank was capitalized for the sum of $200,000.00 divided into shares of $100.00 each, making in all 2000 shares of stock issued by the said bank.

And these defendants further severally answering say, that they do not know and have not been informed save by the said complainant's said amended bill, and cannot set forth as to their belief or otherwise, whether the said plaintiff has or has not made defendants in this action all of the shareholders of said American National Bank in so far as he has been able to ascertain the names thereof, but for the purpose of this action admit that he has.

These defendants further severally answering say, that they admit that the said Elmer C. Brownlee and Peter Frenzer and John N. Frenzer and Howard B. Smith and George G. Wallace, were, at the times mentioned in said amended Bill and still are shareholders of the said American National Bank to the number respectively of ten and fifteen and five and fifty and seventy-five shares as stated in said amended bill.

94 And these defendants further severally answering say, that they admit on information and belief that the other defendants named in said amended bill were the owners and holders of the number of shares set opposite their names respectively therein.

And these defendants further severally answering say, that it is not true and they deny that the said American National Bank at the time it is alleged it went into voluntary liquidation and during the months of December 1895 and January, 1896, and for a long time prior thereto, was wholly insolvent and unable to pay its creditors, and that said American National Bank has ever since remained and still is wholly insolvent and unable to pay its creditors.

And these defendants further severally answering say, that they deny that this action is brought against the said American National Bank and its stockholders jointly under and through any authority granted by the laws of the United States relating to banking.

These defendants further severally answering say, that they admit that under and by virtue of the banking laws of the United States, each and every of said shareholders is held

individually responsible equally and ratably, and not one for another, for all contracts, debts and engagements of the said American National Bank to the extent of the amount of his, her or its stock therein, at the par value thereof, in addition to the amount invested in such shares; but aver that such indebtedness or liability is limited to valid contracts, debts and engagements incurred and entered into by said bank in the usual and ordinary course of the business of banking; and deny that each and every or any of the stockholders of the said American National Bank, and each and every
95 or any of the respondents named in said amended bill as stockholders, are liable for the payment of the claim of plaintiff and of the claim of the said Union National Bank to the amount of stock so held by said defendants or to any other amount or to any extent whatsoever.

And these defendants further severally answering say, that the Articles of Association of the defendant, the American National Bank of Omaha, provided that the Board of Directors of said bank should have authority to elect a President, Vice-President and such other officers and clerks as might be required to transact the business of such Association, to fix the salaries of such officers and clerks, to dismiss such officers and clerks, to define the duties of such officers and clerks, and "generally, to do and perform all the acts that may be legal for a Board of Directors to do under the Revised Statutes aforesaid", to-wit: the Revised Statutes of the United States.

That section 14 of the By-Laws of said defendant, the American National Bank of Omaha, provided that special meetings of the Board of Directors might "be called by the President, Cashier or at the request of three or more directors."

That at a regular annual meeting of the stockholders of said defendant, the American National Bank of Omaha, held January 8, 1895, nine persons were elected to serve as directors of said bank in accordance with the Articles of Association and By-laws of said bank.

That at a special meeting of the directors of said defendant, the American National Bank of Omaha, held on the 21st day of December, 1895, at which meeting there were present six out of the nine directors of said Association and of
96 which special meeting no notice had been given to the three directors not present, the following resolution was moved, seconded, and unanimously adopted, to-wit:

"Whereas, the officers of this bank and the officers of the Union National Bank of Omaha, Nebraska, have negotiated

and agreed upon the sale of this bank to the Union National Bank of the business and assets of this bank on the terms and conditions embodied in the agreement, of which the following is a copy:

Agreement:

This indenture witnesseth, That the American National Bank a corporation of Omaha, Nebraska, hereinafter designated party of the first part, has and by these presents does hereby agree, for the considerations hereinafter expressed, to and with Union National Bank, a corporation, of Omaha, Nebraska, hereinafter designated party of the second part, as follows, to-wit:

First: The party of the first part hereby agrees to sell and assign and does hereby sell and assign to the second party the business of the party of the first part, its cash on hand, office furniture and fixtures and such of its bills receivable as the party of the second part on examination may be willing to take as cash without recourse on the party of the first part.

Second: The party of the second part hereby agrees to purchase and does purchase from the party of the first part the business of the party of the first part, cash on hand, office furniture and fixtures, and such bills receivable as the party of the second part may be willing to take as cash on examination of the same without recourse on the party of the first part and to pay the party of the first part for said office furniture and fixtures the sum of Three Thousand Seven
97 Hundred and Fifty ($3750.00), and to assume the liabilities of the party of the first part to its depositors and on account of its bills payable and to liquidate the remaining assets of the party of the first part which may not be taken and received as cash by the party of the second part without charge or expense to the party of the first part, except such court charges and attorneys' fees as may be found necessary and that such liquidation shall be conducted under the direction of Thomas L. Kimball or such other person as may be agreed upon on behalf of the stockholders of the party of the first part, it being understood and agreed that said Kimball or his successor shall represent in said liquidation the stockholders of the party of the first part, and shall receive, hold and use the proceeds of the assets of the party of the first part as trustee of the parties hereto for the mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary court

charges and attorneys' fees attending said liquidation shall be incurred under the direction of the said Kimball, or his successor.

Third: In consideration of the above agreement of the party of the second part, the party of the first part hereby agrees to sustain and pay one half of the loss and expense which the party of the second part may sustain on account of removal from its present quarters by reason of its unexpired lease on its present place of business and one half of the loss which the party of the second part may sustain on the sale of its office furniture and fixtures, which furniture and fixtures are agreed upon at the present price and value of Three Thousand Seven Hundred and Fifty ($3750.00) Dollars, and the party of the first part further agrees to guarantee and does hereby guarantee the party of the second part against any and all loss on account of assuming the liabilities of the party of the first part as aforesaid. And to this end the party of the first part agrees to execute and deliver to the party of the second part its three promissory notes of equal sums for the amount of liabilities which the party of the second part may assume after crediting the full amount of cash on hand and bills receivable and other assets which may be accepted by the party of the second part on examination, which notes shall draw interest from date at the rate of six per cent per annum, payable quarter annually, and be payable in one, two and three years from date respectively, and shall be non-negotiable. And in case of non-payment of any of said notes when due the whole of said principal sums of all of said notes and accrued interest shall thereupon become due.

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And as further security to the party of the second part the party of the first part agrees to sell and assign and does hereby sell and assign to the party of the second part all of its assets which may remain after the selection therefrom by the party of the second part hereinbefore mentioned, including all its bills receivable, stocks, bonds, personal property of every kind and all real estate and interests therein or liens thereon, with the understanding and agreement that the party of the second part shall have and hold said assets and properties subject to the right of said Thomas L. Kimball, or his successor, to collect and convert the same into cash for the uses and purposes hereinbefore expressed.

And it is further agreed that the party of the first part may pay and have credited on said notes at any time prior to maturity any sums of money of Five Hundred ($500.00) Dollars, and upwards, provided the sums so paid shall be in even hundreds.

99

Witness the names and corporate seals of the parties hereto this 21st day of December, A. D. 1895.

Now therefore, resolved that the foregoing agreement be and the same is hereby ratified and confirmed and that the officers of the bank be and are hereby authorized and directed to execute said agreement and carry the same into effect for and on behalf of this bank, and that the officers of this bank be and are hereby authorized to execute and deliver to the Union National Bank the notes of this bank in the sums which may be required to comply with the terms of the foregoing agreement."

That thereupon on said 21st day of December, 1895, the said Thomas L. Kimball, who was then president of said American National Bank, entered into an agreement in the name of said American National Bank of Omaha with the defendant, the Union National Bank of Omaha, and which agreement was attested by the defendant, Henry F. Wyman, who was then the cashier of said American National Bank, a copy of which is, as these defendants are informed and believe, attached to plaintiff's amended bill as "Exhibit A", and these defendants for greater certainty therein pray leave to refer to the original thereof, when the same shall be produced.

That immediately after the execution and delivery of said agreement and pursuant thereto, and to said resolution, said Thomas L. Kimball and Henry F. Wyman delivered and turned over to said Union National Bank all of the assets then owned by said American National Bank and that said Union National Bank and said Thomas L. Kimball, thereupon took complete and exclusive possession and control of such assets and proceeded to and did reduce certain portions thereof (but what and how much are unknown to these defendants) to cash; that
100 whatever payments have been made upon any of the three notes mentioned in said amended Bill of Complaint have been made out of such assets so transferred and delivered; and that the assets of the American National Bank so turned over and delivered to the said Union National Bank, not including the business, cash on hand, office furniture and fixtures and bills receivable accepted by the said Union National Bank as cash, were of the nominal or face value of about $400,000.00, and of these assets there remained in the hands of the said Union National Bank and said Thomas L. Kimball up to the time of his death and now remain in the hands of said Union National Bank and said James Burness assets of the nominal or face value of about the sum of $371,000.00, which have not been liquidated or converted into money or in any manner applied upon the plaintiff's said claim.

That immediately after the execution and delivery of said instrument, said Union National Bank of Omaha removed from its former place of business, to-wit: on the southeast corner of 16th and Dodge Streets in the City of Omaha, to the place of business of the American National Bank, to-wit: on the northwest corner of 15th and Dodge Streets in said city, and took possession of and has ever since retained possession of the office furniture and fixtures of said American National Bank and its said place of business, leaving its own office furniture and fixtures in the place of business theretofore occupied by it and by its removal left vacant for a long time thereafter, and that said office furniture and fixtures of said Union National Bank were not as valuable as said office furniture and fixtures of said American National Bank.

101 That afterwards, on the 25th day of December, 1895, the said defendant, Thomas L. Kimball, who was then president of said American National Bank, executed and delivered to the said Union National Bank, three promissory notes in the name of the said American National Bank, as maker, for the sum of $67,000.00 each, due in one, two and three years respectively, and of which said three notes the note set out in plaintiff's amended bill is the one first maturing.

That at the times mentioned in said amended bill and at the time herein mentioned there were and still are persons, other than said Union National Bank and said plaintiff, who were and still are creditors of said American National Bank.

That the directors present at said special directors' meeting were Thomas L. Kimball, holding 10 shares of the stock of said bank, William Baird, holding 10 shares, Charles C. George, holding 15 shares, M. Levy, holding 50 shares, Alfred R. Dufrene, holding 75 shares and A. U. Wyman, holding 10 shares; that said Thomas L. Kimball had on deposit on said day to his credit in said American National Bank an amount in excess of $15,000.00; that said M. Levy had on deposit on said day in said bank to his own credit an amount in excess of $150.00 and the Nebraska Clothing Company, of which said Levy was president and manager and in which he was a large shareholder, had on deposit on said day to its credit in said bank an amount in excess of $19,000.00; and that said Alfred R. Dufrene had on deposit on said day in said bank to his credit an amount in excess of $2,000.00 and Mrs. A. R. Dufrene, his wife, had on deposit in said bank on said day to her credit an amount in excess of $2,300.00; that said William Baird at said time was a partner in the firm of Wharton & Baird and said Baird was individually and as a member of said
102 partnership the attorney for William Minot and the representative in said bank of said Minot's interests and

that said Wharton & Baird had on deposit to their credit in said bank on said day an amount exceeding $700.00 and were attorneys for said Union National Bank, and said Minot had on deposit to his credit on said day in said American National Bank the amount of $50,000.00; that said Thomas L. Kimball and said Alfred R. Dufrene were, as a part of the transaction hereinbefore set forth, elected directors of said Union National Bank and were ever since such time up to the times of their decease, such directors; that, as these defendants are informed and believe, said Union National Bank and the officers thereof had actual knowledge of the amounts standing to the credit of the several persons, firms and corporations above mentioned as depositors in said American National Bank and the relations between them; but that, if said Union National Bank and the officers thereof did not have actual knowledge (but which these defendants do not admit) of the exact amounts to the credit of said directors and said other persons and corporations as depositors in said American National Bank and the relations between them, it and they ought to have known the same and could have discovered the same upon the exercise of reasonable diligence in the premises; and that said Kimball, Baird, Levy and Dufrene were a majority of the directors present at said special directors' meeting and said resolution could not have been adopted without their votes or the votes of at least three of them.

That said meeting of said Board of Directors on December 21 1895, was held and said resolution adopted at such meeting and said agreement signed and delivered and said assets 103 delivered and said notes signed and delivered without the knowledge or consent of these defendants or either of them.

And these defendants further severally answering say, that no proceedings have been had at law upon the three notes above mentioned or either of them, and that said plaintiff has not reduced his said claim founded upon the note set out in his amended bill to judgment in any court.

And these defendants further severally answering say, that they are informed and believe it to be true, and, therefore, aver that by reason of the facts hereinbefore set forth these defendants are not and cannot be held liable under the laws of the United States for the payment of said notes or any portion thereof.

Wherefore, these defendants severally humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

Howard B. Smith,
Of Counsel.

ELMER C. BROWNLEE,
PETER FRENZER,
JOHN C. FRENZER, and
HOWARD B. SMITH.
By Howard B. Smith,
Their Solicitor.

Indorsed: Filed Feb. 4, 1901. Geo. H. Thummel, Clerk.

104 Thereupon afterwards, to-wit: On the 12th day of February, 1901, Answer of William S. Poppleton to the Amended Bill of Complaint was filed in said case, which said Answer is in words and figures following, to-wit:—

United States Circuit Court—District of Nebraska.
Sumner Wallace, Plaintiff,
"T" 261 vs.
American National Bank, et al., Defendants.

The Answer of William S. Poppleton, defendant, to the Amended Bill of Complaint of Sumner Wallace, Plaintiff.

This defendant, now and at all times hereafter, saving to himself all and any manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in said bill contained, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for him to make answer, answering, saith:

That he admits that the American National Bank and the Union National Bank are corporations organized under and by virtue of the banking laws of the United States for the purpose of doing business in the city of Omaha; that he admits that the National Bank Building Company of America is a corporation organized under and by virtue of the laws of the State of Nebraska and doing business in the city of Omaha, Douglas County, Nebraska; that he admits that the McCague Investment Company is a corporation organized under and by virtue of the laws of the State of Nebraska; that he admits that Thomas L. McCague, Alex. G. Charlton, Elmer C.
105 Brownlee, Alfred R. Dufrene, Edgar M. Morsman, Philip Mergin, George G. Wallace, William S. Popple-

ton, John S. King, Charles F. Manderson, Charles C. George, Peter Frenzer, John N. Frenzer, Charles H. Walworth, Frank W. Wessells, Frank Graham, James H. McCulloch, John P. Charlton, C. W. Morton, James J. Brown, Jr., James J. Woodward, Viola Coffin, Howard B. Smith, Edward G. Glenn, Emily J. Robinson, James H. Morton, George Morton, Mary E. Morton, Henry F. Wyman, Albert U. Wyman, F. L. McConnell, Trustee, John E. Patrick, William C. Beer, Marcus C. Acheson, George Marples, James H. Conrad, T. R. Neal, William Baird, John L. McCague, Morris Levy, and John L. McCague, William L. McCague, Thomas H. McCague and Alex. C. Charlton, partners doing business under the firm name and style of McCague Brothers, Rufus B. Bullock, Thomas L. Kimball and Alex. G. Charlton, Secretary are each and all of them citizens of the State of Nebraska.

Defendant admits that in the year 1894 until December, 1895, the said Union National Bank and the said American National Bank, by means of their officers and agents held repeated conferences with respect to the taking over of the business and office fixtures and the office of the American National Bank by said Union National Bank, and the terms under which said arrangement could be consummated.

And defendant says that he does not know and can not set forth as to his belief or otherwise whether or not it is the fact as alleged in plaintiff's amended bill that numerous meetings were held between the prominent stockholders of the two said banks with that end in view, and defendant therefore denies the same.

And defendant alleges that he never participated in
106 any conference on said subject and never knew anything about the proposed taking over of the business, office and office fixtures of the American National Bank by said Union National Bank, until said taking over was actually and physically accomplished, and, until said accomplishment, the said proposed taking over was concealed from your defendant by the officers of said American National Bank and said Union National Bank.

Defendant says that he does not know and cannot set forth as to his belief or otherwise, whether or not it is the fact as alleged in plaintiff's amended bill, that, in the month of December, 1895, the American National Bank aforesaid was in such a financial condition that it became necessary for it to provide in some manner for the payment of a large amount of its deposits on or about January 1st, 1896, and that it did not have on hand sufficient funds with which to meet the demands

which it knew would be made upon it at that time, and which, if not paid, would precipitate a demand by all of its depositors and thus bring on the failure of the bank, with all the attendant loss to depositors; and that the amount of deposits at said time and for which the bank was liable upon call was the sum of $193,949.78 and that the amount of available cash to meet the same was only the sum of $36,979.72, and defendant therefore denies the same.

And defendant says that he does not know and cannot set forth as to his belief or otherwise whether or not it is the fact as alleged in plaintiff's amended bill, that, negotiations were then entered into by the officers of the bank with the Union National Bank of Omaha, Nebraska, for a transfer of the business of the said American National Bank to the said Union National Bank, and to ascertain whether or not some
107 arrangement could be entered into whereby the immediate obligations of the American National Bank should be paid and an opportunity be given to realize upon its assets; that as a result of said negotiations and by and under the direction of the Board of Directors of the said American National Bank and the Board of Directors of the said Union National Bank, a contract was entered into by and between said banks, which contract was signed by said American National Bank by Thomas L. Kimball, President, and attested by Henry F. Wyman, Cashier, and by the said Union National Bank by William W. Marsh, President, and attested by Charles E. Ford, Cashier, and defendant therefore denies the same, but, defendant admits that a contract was on the 21st day of December, 1895, pretended to be made by certain officers of the two banks aforesaid which said pretended contract is fully set forth at a subsequent page of this answer.

Defendant says that he does not know and cannot set forth as to his belief or otherwise whether or not it is the fact as alleged in plaintiff's amended bill, that, immediately after the signing of said agreement, the transfer of the business of said American National Bank was made to the said Union National Bank pursuant to said agreement, and the said Union National Bank at once assumed the payment of all the liabilities of the said American National Bank on the books of the said bank at the time of said transfer, except liabilities for circulation and stockholders, and the said Union National Bank, long prior to the commencement of this action, has paid all of said deposits in full; that the liabilities so as aforesaid assumed by the Union National Bank were as follows: Deposits $193,949.73, Demand Certificates—$5,388.00 Time Certificates, $25,155.55, Cer-
108 tified Checks, $452.04, Cashier's Checks, $327.66, Banks and Bankers, $13,824.27, Bills Payable $50,000.00; that

at said time the said Union National Bank received from the American National Bank the following items in cash, drafts and notes, as follows: Cash, $36,795.78, Drafts on American Exchange Bank, Chicago, $8,000.00, Drafts on Lincoln National Bank, Chicago, $2,000.00, Drafts on Continental National Bank, St. Louis, $234.61 Drafts on Howard National Bank, Boston—$87.40, Drafts on Central National Bank, Philadelphia, $1,000.00, American Cashier's Checks, $39,929.51, Three Notes, $67,000. each, one, two and three years, $201,000.00; that the Cashier's check of $39,929.51 was paid by turning over to said Union National Bank notes for $22,299.10 and a cashier's check for $17,000.00 which was afterwards paid by the American National Bank; that the liabilities of the said American National Bank assumed by the said Union National Bank in excess of the assets of the said American National Bank taken and accepted by the Union National Bank as cash, and without recourse, pursuant to the aforesaid agreement amounted to the sum of $201,000; that immediately after ascertaining under said agreement the amount of liabilities of the American National Bank assumed by the said Union National Bank in excess of the American National Bank taken and accepted by the Union National Bank as cash, and without recourse, and on the 23d day of December, 1895, the said American National Bank, pursuant to the terms of said agreement and in performance thereof executed to the said Union National Bank its three promissory notes aggregating the amount ascertained as aforesaid, to-wit: the sum of $201,000, each of said notes being for the sum of $67,000, and bearing interest at the rate of six per cent per annum from date, one of said notes maturing in one year from its date, one in two years from its date,
109 and one in three years from its date; that the balance of the assets of said American National Bank being all of the assets of said American National Bank not taken by the said Union National Bank as cash, and without recourse, and in pursuance to and in performance of said agreement, were turned over to one Thomas L. Kimball as Trustee for the parties to said agreement, to collect and convert the same into cash for the uses and purposes expressed in said agreement; that on the 8th day of August, 1898, the said Union National Bank sold, assigned and transferred said note, due in one year from date to plaintiff for a valuable consideration, and that plaintiff is and was at the commencement of this action the legal owner and holder thereof; that a copy of said note with endorsements thereon is as follows:

"67,000.00 Omaha, Nebr., Dec. 25, 1895.

One year after date for value received, we promise to pay to the Union National Bank Sixty Seven Thousand Dollars at

its banking office in Omaha, Neb., with interest at six per cent per annum from date payable quarterly until paid.

THE AMERICAN NATIONAL BANK,
By Thomas L. Kimball, President.

Attest:
Henry F. Wyman, Cas".

Endorsed:	Paid Jan. 27, 1896	$3,000.00
	Paid Feb. 29, 1896,	3,000.00
	Paid Mar. 10, 1896,	1,000.00
	Int. paid to Mar. 23, 1896,	
	Paid May 5, 1896,	6,000.00
	Paid May 16, 1896,	4,000.00
	Int. paid to June 23, 1896,	
	Int. paid to Mar. 23, 1897,	
	Paid Mar. 23, 1897.	3,235.00
	Paid May 12, 1897,	4,000.00

Pay Sumner Wallace, or order, without recourse,

UNION NATIONAL BANK,
By J. W. Thomas,
Its Cashier."

Aug. 8, 1898.

110 That there is now due and owing on said note to plaintiff from the said American National Bank the sum of ....., and your defendant therefore denies the same except that defendant admits that the payments so as aforesaid alleged to have been made by the American National Bank have been made.

Defendant says that he does not know and cannot set forth as to his belief or otherwise whether or not it is a fact as alleged in plaintiff's amended bill that said Union National Bank is a creditor of the American National Bank and is still the owner and holder of the two other notes in plaintiff's amended bill described and defendant therefore denies the same.

Defendant denies that the stockholders of the said American National Bank including these defendants, each and every of them, were, and each of them was advised of the situation and condition of the said American National Bank with respect to its inability to pay its depositors and liabilities at the time of the making of the agreement and the notes hereinbefore set out, and that unless some arrangement was made to procure assistance for said American National Bank, the said Bank could not pay its depositors and that the loss under such circumstances would be very great and that the liability of the stockholders would be greatly increased.

Defendant denies that with the knowledge of such condition and liability of said American National Bank, the said stockholders and each and every of them, and the said corporation, the American National Bank, accepted and received the benefits of such contract and ratified and affirmed the same, and allowed and permitted and induced the said Union National Bank to pay out the said sums of money so as aforesaid paid by said Union National Bank to the depositors of the American
111 National Bank and accepted the benefits of such agreement and the payments of the same.

Defendant denies that by means of the actions and inducements of the officers and agents of the American National Bank, and by means of the execution of said notes and contract so as aforesaid made by and with the consent, procurement and inducement of said stockholders, the defendants herein, and with the knowledge and consent of the said defendants, procured the Union National Bank to advance the money to pay off the aforesaid liabilities of the American National Bank and procured the said Union National Bank to expend large sums of money to pay off and satisfy said liabilities and that by means of such contract and notes the said defendants procured the said Union National Bank to expend the sum of over Two Hundred and Eighty Thousand Dollars in extinguishing, paying off, and settling the obligations of said American National Bank.

Defendant denies that the said defendants were, and each of them was advised of the negotiations during the time the same were pending, and the purpose and design of such negotiations and acquiesced in the same and consented thereto. And on the contrary your defendant alleges that he was never advised of said negotiations and as soon as he heard of the result of the same and of said pretended contract of December 21st, 1895, and of the pretended carrying out thereof, and of the taking over of the business office and office fixtures of the American National Bank by the Union National Bank, he promptly and immediately protested and objected thereto, making his protest and objection to the officers of the Union National Bank, the officers of the American National Bank, and the Comptroller of the Currency, and he has ever
112 since protested against the said transaction and has never at any time acquiesced in or consented to the same.

Your defendant says that he does not know and cannot set forth as to his belief or otherwise whether or not it is the fact, as alleged in plaintiff's amended bill, that at the time of the giving of the note described herein the said American Na-

tional Bank delivered to Thomas L. Kimball, as trustee, certain notes and property as security to the notes sued on herein and other notes given to the said Union National Bank at the same time and that said trustee was to collect said security and apply the proceeds thereof to the payment of said notes; That the plaintiff has not a list or description of said security and is unable to give the court a full and accurate description of the same; that the assets of the said American National Bank which by the terms of said contract were not taken as cash but which passed to the trustee, Thomas L. Kimball are now held by one James Burness, as trustee, said Kimball since the commencement of said action having deceased, and the said Burness having been by the Court appointed his successor and to the end that this Honorable Court may have all the [—] herein for its cognizance and for the preservation of such property and due administration of such trusteeship and thus be able to do full and complete equity to all the parties hereto in and about the assessment and judgment against the stockholders of the said American National Bank as hereinafter set out; that the said James Burness, Trustee, should bring into this Court the said assets in his hands to be and abide the order of this Honorable Court in and about the same, as equity and good conscience may require, so that full and complete justice be done herein in the assessment and judgment herein prayed, and in
113 the final liquidation of said Bank, and the distribution of its assets by the final decree herein, or as may be just and equitable, and defendant therefore denies the same.

And the defendant denies that the said respondent, the American National Bank, on the 14th day of January, 1896, went into voluntary liquidation under the provisions of section 5220 of the Revised Statutes of the United States, and that since said time, the said corporation, the American National Bank has not done any banking business except what may have been necessary in looking towards the closing up of its business.

And your defendant says that he does not know and cannot set forth as to his belief or otherwise whether or not it is the fact, as alleged in plaintiff's amended bill, that the plaintiff is a creditor of the said American National Bank and that he brings this action on behalf of himself and all the other creditors of the said American National Bank and the shareholders thereof to the end that the affairs of said bank may be fully settled and wound up, and that the plaintiff for himself and all other creditors of said bank may have a decree and judgment against the said shareholders as by law provided; and that all of the respondents named in this bill were

shareholders of the said American National Bank at the time that it went into liquidation, as hereinbefore set out, and defendant therefore denies the same.

Defendant admits that the American National Bank was capitalized for the sum of $200,000.00 divided into shares of $100.00 each, making in all 2,000 shares of stock issued by said Bank.

And your defendant says that he does not know and cannot set forth as to his belief or otherwise whether or not it is the fact, as alleged in plaintiff's amended bill, that the plaintiff has made defendants in this action all of the stock holders of the said American National Bank in so far as plaintiff has been able to ascertain the names thereof, and that the respondents named herein, at the time the said American National Bank went into voluntary liquidation, as hereinbefore set out, were the owners and holders of the number of shares set opposite their names as hereinafter specified, to-wit:

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Thomas H. McCague,	10	shares,
Alex. G. Charlton,	9	
Elmer C. Brownlee,	10	
Alfred R. Dufrene,	75	
Edgar M. Morsman,	75	
Philip Mergin,	7½	
George G. Wallace,	75	
William S. Poppleton,	56½	
John S. King,	2	
William Wallace,	20	
Chas. F. Manderson,	10	
Anna C. Crowell,	9 3-4	
Chas. C. George,	15	
R. H. McClellan,	50	
Peter Frenzer,	15	
John N. Frenzer,	5	
Chas. H. Walworth,	22½	
Frank W. Wessells,	3 3-4	
Frank Graham	3 3-4	
James H. McCulloch,	25	
John P. Charlton,	7½	
C. W. Morton,	6	
Royal Wilson,	10	
Jacob Wead,	7½	
James J. Brown, Jr.,	5	
James J. Woodward,	2½	
Viola Coffin,	7½	
Howard B. Smith,	50	

	Edward G. Glenn,	5	
	Emily J. Robinson,	1½	
	James H. Morton,	2	
	George W. Morton,	1	
	Mary E. Morton,	1	
	William Wilson,	11½	
	Henry F. Wyman,	58½	
	A. U. Wyman,	10	
	F. R. McConnell, Trustee,	5	
	John Speer,	110	
115	John E. Patrick,	15	shares,
	R. L. Brownlee,	25	
	Miss Caroline Carpenter,	18	
	W. C. Beer,	6	
	Marcus C. Acheson,	15	
	George Marples,	15	
	Arthur H. Flack,	5	
	Meade C. Williams,	11½	
	James H. Conrad,	10	
	T. R. Neal,	16	
	J. H. Hawkins,	25	
	William Baird,	10	
	The Manufacturers National Bank	25	
	John L. McCague,	287	
	Morris Levy,	50	
	Natl. Bank Bldg. Co. of America	615	
	McCague Brothers,	50	
	Rufus B. Bullock,	22½	
	Thomas L. Kimball,	20	
	Alex. G. Charlton, Secretary,	20	
	Samuel Blackwell,	50	

That the number of shares above set out opposite the name of Alex. G. Charlton, Secretary, to-wit: twenty (20) shares, have been at all times since the placing of said shares in the name of said Alex. G. Charlton, Secretary, and still are owned by the said defendant, McCague Investment Co., and that the said defendant, McCague Investment Company is liable upon any assessment which may be made upon said shares of stock, and defendant therefore denies the same except that your defendant was on the 14th day of January, 1896, the owner of 56½ shares of said stock and that your defendant believes it to be true that the holdings of said stock by the National Bank Building Company of America are as stated in said plaintiff's bill.

And your defendant denies that the American National Bank ever went into voluntary liquidation and your defendant says that he does not know and cannot set forth as to his belief or

otherwise whether or not it is the fact as alleged in plaintiff's amended bill that during the months of December, 1895,
116 and January, 1896, and for a long time prior thereto the American National Bank was wholly insolvent and unable to pay its creditors, and that the said American National Bank has ever since remained and still is wholly insolvent and unable to pay its creditors and that by reason of the voluntary liquidation of the Bank as hereinbefore set forth, and the insolvency of said bank and its inability to meet its obligations, this action is brought against the said American National Bank and its stockholders jointly under and through the authorities granted by the laws of the United States relating to banking, and defendant therefore denies the same.

And defendant denies that under and by virtue of the Banking Laws of the United States each and every of said shareholders, holders of stock of said American National Bank, is held individually responsible equally and ratably, and not one for another for all contracts, debts and engagements of said American National Bank to the extent of the amount [or] his, her or its stock therein, at the par value thereof, in addition to the amount invested in such shares, and that each and every of the stockholders of the said American National Bank, and each and every of the defendants named herein are liable for the payment of the claim of the plaintiff and of the claims of all creditors of said American National Bank to the amount of stock so held by said defendants.

And your defendant says that he does not know and cannot set forth as to his belief or otherwise whether or not it is the fact, as alleged in plaintiff's amended bill, that this action is brought by the plaintiff on behalf of himself and all other creditors of the said American National Bank, in order that this Honorable Court may ascertain who the creditors of said American National Bank are and the total amount of the indebtedness of said Bank, and may further ascertain the
117 amount of the assessment necessary to be made against the shareholders of the said American National Bank in order to pay such indebtedness, and that such assessment as may be necessary be made by this Honorable Court, and that by its decree each and all of said shareholders may be required to pay into this Court the amount so found due, and that the amount so found due from each of said shareholders may be and become a judgment in this action against such shareholders; and that the Trustee so as aforesaid appointed should be brought into this Honorable Court to bring into this cause the assets so as by said agreement to him conveyed, to have the same subject to the order of this Honorable Court as to it may seem meet and to be and abide its order, that complete

equity may be done in respect to all the parties hereto and that the affairs of this said defendant, the American National Bank, may be marshalled between the parties and wound up and litigated in a due, orderly and equitable manner, and that the assets so in the hands of said trustee may be preserved for the benefit of the creditors and shareholders of said American National Bank, and dealt with as equity and good conscience may require, and defendant therefore denies the same.

And your defendant denies each and every other allegation in said plaintiff's amended bill contained not hereinbefore specifically admitted or denied.

And this defendant submits to this Honorable Court that all and every of the matters in said plaintiff's amended bill mentioned and complained of are matters with respect to which the said plaintiff is not entitled to any relief in or from a court of equity against your said defendant, and are not sufficient to constitute a cause of action against your defendant, and your defendant claims and hopes he shall have the same benefit of this defense as if he had demurred to said plaintiff's amended bill for want of equity.

118

And defendant further answering, claims and alleges that prior and up to August 12th, 1889, John L. McCague, William L. McCague and Thomas H. McCague were engaged in a general banking and real estate business in the City of Omaha, Nebraska, under the name of McCague Brothers.

That on or about the month of October, 1886, the said William L. McCague became the owner of lot eight (8) in block eighty-seven (87) in the City of Omaha, State of Nebraska, and paid for the same a total consideration of Thirty-one Thousand ($31,000.00) Dollars.

That on or about the first day of August, 1889, the said John L. McCague, William L. McCague and Thomas H. McCague took the necessary steps and caused the necessary steps to be taken to organize the American National Bank of Omaha under the laws of the United States with a capital stock of Two Hundred Thousand ($200,000.00) Dollars, and solicited subscriptions for said capital stock and your defendant subscribed for Seventy five shares of said capital stock of the par value of Seven Thousand Five Hundred ($7,500.00) Dollars; and afterwards paid for the same in cash within the time prescribed by law, but said amount of said defendant's holdings was afterwards reduced to 56¼ shares.

That said American National Bank of Omaha was duly organized and on or about the 12th of August, 1889, commenced business and was the American National Bank of Omaha
119 referred to in plaintiff's amended bill, and John L. McCague was elected president of said Bank, William L. McCague was elected a director and Thomas H. McCague, Cashier.

That on or about the second day of September, 1889, the said John L. McCague, William L. McCague and one John Laurence caused to be organized and incorporated under the laws of the State of Nebraska a corporation known as the National Bank Building Company of America, having for its purpose the erecting, holding, owning, controlling and [generally] management of buildings in Omaha and elsewhere for the purpose and use of banks, shops, dwellings, offices and the like, and the buying and acquiring title to, owning, holding, controlling, selling, conveying, leasing, renting, having and handling real and personal property in Omaha and elsewhere to the said end and purpose.

That the specific purpose of said corporation was to acquire title to lot eight (8) block eighty-seven (87) Omaha, and erect a Bank and office building thereon and enjoy the revenue from the leasing of the rooms and offices in the same and your defendant alleges that John L. McCague was the managing agent for said corporation, and that William L. McCague and Thomas H. McCague were stockholders in the same.

That on or about the second day of September, 1889, a secret arrangement, unknown to your defendant, was, as defendant is informed and believes, entered into between the said National Bank Building Company of America and certain stockholders on the one side whose names are not known to your defendant, and John L. McCague, William L. McCague and Thomas H. McCague and other officers and certain stockholders of the American National Bank on the other side, by which, as defendant is informed and believes, latter
120 parties agreed to use their influence in the management of the American National Bank to bring the said bank into the building to be erected by the said National Bank Building Company of America as a tenant thereof at a rental of Forty eight Hundred ($4,800.00) Dollars per year for the banking room as designated in the plans of said building at said time and substantially the same as afterwards built and occupied by said Bank, or at such a rental as taken together with the other rentals secured from said building should amount to a certain agreed per cent, the exact amount of which is not known to your defendant, upon the money in-

vested in said bank building and the real estate on which the same should be erected.

That the said agreement was, as defendant is informed and believes, in contemplation by John L. McCague, Thomas H. McCague, William L. McCague, James Laurence, William Minot Jr., and other parties whose names are unknown to your defendant subsequently interested in the American National Bank and the National Bank Building Company of America, and who among them, upon the organization of said corporation your defendant alleges, acquired and have ever since held a controlling influence in the same, before either of said corporations were organized, and said contemplated agreement was one of the inducements to the organization of the American National Bank by said John L. McCague, William L. McCague and Thomas H. McCague, which fact was unknown to your defendant.

That thereupon the said William L. McCague transferred said lot eight (8) block eighty-seven (87) Omaha, to Henry Griffen for the purpose of having said Henry Griffen convey
the said William L. McCague's title to said real estate
121 to the National Bank Building Company of America,
and thereupon said Henry Griffen and wife transferred the title to said real estate to the National Bank Building Company of America.

That for the purpose of increasing the apparent amount of the investment of said National Bank Building Company of America and the furnishing a basis for demanding high rentals from the American National Bank and others, the consideration of said transfer from William L. McCague to said National Bank Building Company was represented and stated to be the sum of Seventy-five Thousand ($75,000.00) Dollars, which sum was, as defendant is informed and believes Forty-four Thousand ($44,000.00) Dollars in excess of the price paid for said property by William L. McCague and greatly in excess of the real amount and consideration received by him for said real estate from said National Bank Building Company of America.

That thereupon a Bank and office Building named the "McCague Building" was erected on said real estate by said National Bank Building Company of America and at the completion thereof in the year 1890, the Board of Directors of the American National Bank voted to remove the said Bank to said Building and to take a five years lease of a portion of the east half of the second floor of the same at a rental of Forty Eight Hundred ($4,800.00) Dollars per year, which de-

fendant alleges was an unreasonably and grossly excessive rental far exceeding the real rental value of said quarters and thereupon said American National Bank was removed into said building and thereafter continued to be there.

That said action of said Directors was influenced so far as regarded those directors not interested in the National
122 Bank Building Company of America, by the solicitation of John L. McCague, William L. McCague and Thomas H. McCague and by the confidence which the directors reposed in John L. McCague who was then president of said bank, and in Thomas H. McCague who was then cashier, and by the representations of said John L. McCague, Thomas H. McCague and William L. McCague that the then quarters of the Bank were utterly inadequate for the proper transaction of its business and the proper convenience and treatment of its customers, officers and employes, and that the said quarters in the McCague Building would be worth to the Bank the said rental of Forty Eight Hundred ($4800.00) Dollars per year, which representations, the said Directors, relying upon the experience, judgment and acquaintance of said president and cashier as regarded the business of said Bank and their supposed cash interest and that of William L. McCague in the capital of said Bank, believed and were influenced by.

Your defendant alleges that for the purpose of securing subscriptions to the stock of the American National Bank and for the purpose of securing the subscription of your defendant to said stock, said John L. McCague, Thomas H. McCague and William L. McCague represented to your defendant that they would at once turn over to said American National Bank the banking business of McCague Brothers aforesaid, but your defendant alleges that said John L. McCague, William L. McCague and Thomas H. McCague failed to make good their said representation that they would turn over to said Bank the Banking business of the McCague Brothers, but that on the contrary they organized, under the laws of Nebraska, the McCague Savings Bank and secured therefor quarters in the McCague Building immediately across the hall from the
123 American National Bank, and there carried on a Savings Bank business composed in greater part of the former banking business of the firm of McCague Brothers, thus directly competing with the American National Bank for deposits and patronage, to the injury of business of said American National Bank of Omaha.

And your defendant alleges that the said organization of the McCague Savings Bank and its taking quarters in the said McCague Building were, as defendant is informed and

believes, a part of the inducement for the organization of the National Bank Building Company of America and the erection of the McCague Building, which fact was unknown to your defendant, and were as defendant is informed and believes, in contemplation by John L. McCague and Thomas H. McCague before the erection of said McCague Building and at the time of the organization of the American National Bank of Omaha.

That on the 12th day of June, 1893, the said American National Bank of Omaha passed into the hands of a bank examiner acting under the direction of the comptroller of the currency and became closed and suspended.

That thereupon the said John L. McCague, William L. McCague, Thomas H. McCague and William Minot, Jr., and James Laurence and certain other parties whose names are not known to your defendant, representing among them a controlling influence in both the American National Bank and the National Bank Building Company of America made strenuous efforts to induce the comptroller of the currency to permit the bank to again open and continue in business.

That thereupon the comptroller of the currency signified his willingness to permit said bank to resume business, provided its capital were reinforced to the extent of Fifty Thou-
124 sand ($50,000.00) Dollars in cash.

That on account of the pecuniary interest of the said National Bank Building Company in retaining said bank in operation as a tenant of its building, both on account of the bank rental and the rental of a large number of other tenants who were attracted to said building by their business connection with said bank, certain stockholders in said National Bank Building Company of America whose names are not all known to your defendant but among them were William Minot, Jr., and James Laurence, supplied or caused to be supplied or pretended to supply or cause to be supplied the necessary amount of money to pay said assessment, and your defendant alleges that all of the money necessary to pay the assessments of the stockholders who were unable or unwilling to pay the same were supplied or pretended to be supplied or to be caused to be supplied by said parties.

That in return for said assistance or pretended assistance and in order to give the parties furnishing the same more complete control of the management of the American National Bank, the said John L. McCague, William L. McCague and Thomas H. McCague transferred all or nearly all their stock in said Bank to the said National Bank Building Company of America and said National Bank Building Company has, as defendant is informed and believes, ever since held the same.

That thereafter on or about the seventh day of September, 1893, it having been made to appear to the Comptroller of the Currency that the capital of said Bank had been reinforced in accordance with his aforesaid requirements, he permitted the said Bank to resume business and it thereupon did again resume business and continue to carry on the same.

125 Your defendant alleges that after the resumption of said American National Bank in September, 1893, it was controlled by the National Bank Building Company, and those of its stockholders who were also stockholders in the National Bank Building Company, and that, unknown to your defendant, the design and intention of said controlling interest was not to continue in the banking business but to use the business and good-will and property of said Bank as the basis of some sale or contract by which the business and good will and property of the said American National Bank might be made a consideration to some other National Bank of Omaha to move into the said McCague Building and thus prevent the loss of a bank tenant and the consequent loss of rental from the east banking room and deterioration in the rental value of the remaining portion of the building by the cessation of banking business therein.

That during the years 1894 and 1895 and on the 24th day of December, 1895, William Minot, Jr., Thomas L. Kimball, Alfred R. Dufrene and Morris Levy who were all directors and Thomas L. Kimball of whom was President of the said American National Bank of Omaha had on deposit in said bank sums of money aggregating, as your defendant is informed and believes, over Sixty Thousand ($60,000.00) Dollars, and that owing to the unprosperous condition of business there was danger that the withdrawal of the same in the ordinary course of business at any time during 1895 might cause said bank to suspend.

And your defendant alleges that for the reason that the aforesaid National Bank Building Company of America and its stockholders and tenants owned and controlled a large portion of the stock of said American National Bank of Omaha and had been chiefly instrumental in bringing about its re-
126 sumption and were willing to assist it and had assisted it from time to time for the purposes aforesaid, and for the reason that without the assistance and deposits of the National Bank Building Company and its stockholders the Directors and officers of said Bank feared that it would fail and that they would lose their deposits in said bank and would be liable to an assessment on their stock, the officers and directors of the said American National Bank were wholly subject as regarded their share and voice in the management of said bank

to the will and control of said National Bank Building Company of America and its stockholders represented in the matter principally by William Minot, Jr.

That for more than a year prior to December 21st, 1895, negotiations were in progress, unknown to your defendant, between William Minot, Jr., and other parties representing the National Bank Building Company of America and various banking institutions in Omaha, among which were the Union National Bank of Omaha and the Nebraska National Bank of Omaha, looking toward the transfer to one of said banks of the business, patronage and good will of said American National Bank upon condition that the Bank taking the same would move its business into the McCague Building and pay such other and further consideration as said William Minot, Jr., and said National Bank Building Company and said officers and directors of said American National Bank might be able to obtain.

That in December, 1895, William Minot, Jr., came in person to Omaha and after negotiating personally with the representatives of various banks in Omaha finally succeeded in bringing about, unknown to your defendant, an agreement and
127 understanding between the American National Bank and the said Union National Bank of Omaha which was embodied in the form of a contract as follows:

"This Indenture Witnesseth, that the American National Bank, a corporation, of Omaha, Nebraska, herein described as the party of the first part has and by these presents does hereby agree for the consideration hereinafter mentioned, to and with the Union National Bank, a corporation, of Omaha, Nebraska, herein described as the party of the second part as follows:

First. The party of the first part agrees to sell and assign to the party of the second part its cash on hand, office furniture and fixtures and such of its bills receivable as the party of the second part may be willing to take as cash without recourse on the party of the first part.

Second. The party of the second part agrees to purchase and does hereby purchase from the party of the first part the business of the party of the first part, its cash on hand, office furniture and fixtures and such bills receivable as the party of the second part may be willing to take as cash on examination of the same without recourse on party of first part, and to pay the party of the first part for said office furniture Three Thousand Seven Hundred and Fifty Dollars ($3,750.00) and to assume the liabilities of the party of the first part to its

depositors and on account of its bills payable, and to liquidate the remaining assets of the party of the first part which may not be taken or received as cash by the party of the second part without charge or expense to the party of the first part except such court charges and attorney's fees as may be found necessary, and that such liquidation shall be carried on under the direction of Thomas L. Kimball or such
128 other person as may be agreed upon by the stockholders of the party of the first part, it being understood and agreed that said Kimball or his successor shall represent in said liquidation the stockholders of the party of the first part and shall receive and hold the proceeds of the assets of the party of the first part as trustee of the parties hereto for mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary court charges and attorney's fees in said liquidation shall be incurred under the direction of said Thomas L. Kimball or his successors.

Third. In consideration of the above agreements of the party of the second part, the party of the first part hereby agrees to sustain and pay one-half of the loss and expense which the party of the second part may sustain on account of removal from its present quarters by reason of its unexpired lease on its present place of business, and one-half of the loss which party of the second part may sustain on the sale of its office furniture and fixtures, which furniture and fixtures are agreed upon at the present price and valuation of Three Thousand Seven Hundred and Fifty Dollars ($3,750.00), and the party of the first part further agrees to guarantee and does hereby guarantee the party of the second part against any and all loss on account of its assumption of the liabilities of the said party as aforesaid.

And to this end the party of the first part agrees to execute and deliver to the party of the second part its three promissory notes of equal sums for the amount of liability which party of the second part may assume after crediting the full amount of cash on hand and bills receivable and other assets which may be accepted by party of the second part on examination, which notes shall draw interest from date at the rate of six
129 per cent per annum payable quarterly, and to be payable in one, two and three years from date, respectively, and be non-negotiable.

And in case of non-payment of any of said notes when due, the whole of said principal sums of all said notes and accrued interest shall thereupon become due and payable.

And as further security to party of the second part the party of the first part agrees to sell and assign and does hereby sell and assign to the party of the second part all of its assets which may remain after the selection therefrom by the party of the second part heretofore mentioned including all its bills receivable stocks, bonds, personal property of every kind and all real estate and rights and interests therein and liens thereon with the understanding and agreement that the party of the second part shall have and hold said assets and properties subject to the rights of the said Thomas L. Kimball or his successors to collect and convert the same into cash for the use and purposes hereinbefore expressed.

And it is agreed that the party of the first part may pay and have credited on said notes at any time any sum of money of Fifteen Hundred Dollars ($1,500.00) and upwards, provided the sum so paid shall be in even hundreds.

Witnesseth the name and corporate seal of the parties hereto this 21st day of December, 1895.

[Seal] THE AMERICAN NATIONAL
Attest: BANK OF OMAHA,
Henry F. Wyman, Cashier. By Thomas L. Kimball,
President.

THE UNION NATIONAL
Attest: BANK OF OMAHA,
C. E. Ford, Cashier. By W. W. Marsh,
[Seal]" President.

130 Defendant alleges that on or about the 21st day of December, 1895, the said contract was approved, ratified and confirmed by the Board of Directors of the American National Bank and the Union National Bank and the officers of said Banks were respectively by their respective Boards of Directors authorized to carry out and execute the provisions of said contract, and, after crediting the cash of the American National Bank and certain of its assets as cash against the obligations of the American National Bank assumed by the Union National Bank, the three non-negotiable notes provided in said contract to be executed by the American National Bank and delivered to the Union National Bank were so executed and delivered and the remaining provisions of said contract were executed, or put in process of execution.

Your defendant alleges that at the same time and in consideration of said agreement which your defendant alleges was highly advantageous to said Union National Bank by reason of the deposits, good will and patronage which it brought to

said Bank, the said Union National Bank, as defendant is informed and believes, secretly agreed with certain of the Directors of the American National Bank to hold them harmless as to any further liability on their part as stockholders in the American National Bank, and to give the said parties stock in the Union National Bank to a certain amount not known to your defendant, either free of cost or on favorable terms, and to elect said parties or their representatives Directors in said Union National Bank and to otherwise protect them in a manner not precisely known to your defendant, for causing the said American National Bank to enter into said agreement advantageous to said Union National Bank.

131 That it was no part of said agreement between the Union National Bank and the American National Bank and the said stockholders in the American National Bank that your defendant's interests as a stockholder in the American National Bank should be protected or that he should receive any consideration whatever from said transactions, and your defendant alleges that said contract has never been submitted to or ratified by the stockholders of the American National Bank, and defendant alleges that he did not know of said contract nor did your defendant know that such a contract was in contemplation until after the 21st day of December, 1895.

Your defendant alleges that as soon as said contract came to his knowledge, he protested against the same to officers of the American National Bank and of the Union National Bank and to the Comptroller of the Currency, and has never since approved or acquiesced in the same.

That on or about the 23d day of December, 1895, the Union National Bank of Omaha, in pursuance of said agreement aforesaid, moved hastily and secretly into the place of business of the said American National Bank in said McCague Building and has ever since remained there.

Your defendant alleges that he has never received any consideration whatever for the said transfer of said assets, patronage and good will of the said American National Bank to the said Union National Bank, but that afterwards, on or about the 14th day of January, 1896, or a short time before or after said date, as your defendant is informed and believes, certain of the Directors of the American National Bank
132 at the time of the execution of said contract of December 21st, 1895, received shares of stock in the Union National Bank, the exact amount of which is not known to your defendant, but which defendant alleges, on information

and belief, were not paid for in full in cash or otherwise, and thereupon certain of said parties were elected directors in the Union National Bank.

That at all times since the erection of said McCague Building a portion of its offices have been empty and that such tenants as it has are attracted mainly by reason of the presence of a national bank on its main floor, and have been for the most part tenants having some business connection as customers, borrowers, employees, attorneys, contractees, or otherwise with said bank and that without the presence of a national bank in said building it would have lost a large proportion of the tenants it possessed, and your defendant alleges that the said contract and agreements entered into as aforesaid, on or about the 21st day of December, 1895, by providing that the Union National Bank of Omaha should move into said building were worth to the National Bank Building Company of America the sum of One Hundred Thousand Dollars ($100,000.00) and upwards, which consideration for said sale of the business, patronage and good will of the said American National Bank as aforesaid caused to be made by the said William Minot Jr. representing the said National Bank Building Company [innured] wholly to the benefit of said National Bank Building Company of America to the exclusion of the other stockholders in said bank, and for said reason and for the reason that certain of the Directors of the American National Bank as aforesaid received inducements from the Union National Bank as aforesaid to vote for the making of said contract of December 21st, 1895, and because of the fact that the interests of a number of said directors as
133 depositors to be protected outweighed their interest as stockholders in said American National Bank, and because of the secrecy of said actions of said parties to said contract in making and carrying the same into execution, and by reason of the facts in this answer hereinbefore stated, the said contract was and is fraudulent, and null and void and no liability against your defendant on his stock in the said American National Bank of Omaha can be based thereon.

And your defendant alleges that under and in pursuance of said contract, the business and property and good will and assets of said American National Bank were actually transferred and placed in the possession of the Union National Bank and it became the owner of the same not in the ordinary course of the banking business and contrary to the laws of the United States, and said contract is for that reason and for other reasons appearing on its face null and void and of no force and

effect and no liability against your defendant on his stock in said American National Bank can be based thereon.

Defendant alleges that said Union National Bank and its officers entered into said contract of December 21st, 1895, and that the Board of Directors subsequently ratified the same with full knowledge of all the facts constituting its illegal and fraudulent character hereinbefore set forth, and your defendant alleges that said note sued upon in this action and set forth in plaintiff's bill is one of three non-negotiable notes executed by the American National Bank under and by virtue of and as a part of said fraudulent and illegal contract of December 21st, 1895, as hereinbefore set forth, but as to the amount, date, endorsements and terms of said note and amount which has been paid on the same, and whether plaintiff in this cause has actually purchased and paid for the
134 same, defendant, as hereinbefore stated, is not informed; and said note and the execution and delivery of the same to the Union National Bank of Omaha is therefore and on account of the facts touching the said contract of December 21st, 1895, and the making, manner and execution thereof and the circumstances leading up to and surrounding the same as hereinbefore set forth, illegal, fraudulent, null and void, and the officers of the American National Bank had no lawful authority to execute or deliver the same and no liability against defendant on his stock in said American National Bank can be based thereon.

All which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

WILLIAM S. POPPLETON, Defendant.
WILLIAM S. POPPLETON, Counsel.

Indorsed: Filed Feb. 12, 1901. Geo. H. Thummel, Clerk.

135 Thereupon afterwards, to-wit: On the 14th day of June, 1901 a Joint and Several Answer was filed in said case, which said Joint and Several Answer is in words and figures following, to-wit:

In the Circuit Court of the United States in and for the District of Nebraska.

Sumner Wallace, Plaintiff,
Doc. T vs. No. 261.
The American National Bank, et al., Defendants.

Joint and Several Answer of Caroline Carpenter, et al.

To the Honorable, the Judges of the Circuit Court of the United States in and for the District of Nebraska.

Caroline Carpenter, The McCague Investment Company, John L. McCague, Thomas H. McCague, William L. McCague, Alex. G. Charlton, Anna C. Crowell, Emily J. Robinson, George Marples, McCague Brothers, a partnership, Alex. G. Charlton, Secretary, Rufus B. Bullock, Robert H. McClellan, John Speer, R. L. Brownelee and J. H. Hawkins, answering defendants in the above entitled cause, answering the plaintiff's amended bill of complaint jointly and severally now and at all times hereafter reserving to themselves all right of exception to said complainant's said amended bill of complaint for answer thereto or so much and such parts thereof, as these answering defendants are advised is material or necessary for them to make answer unto jointly and severally say:

That they jointly and severally admit that The American National Bank and the Union National Bank are corporations organized under and by virtue of the banking laws of the United States for the purpose of doing business in the City of Omaha, Douglas County, Nebraska, but deny that said banks are within the jurisdiction of the Circuit Court of the
136 United States within and for the District of Nebraska.

That they jointly and severally admit that each of them were at the time of the filing of the bill in this said cause and now are citizens and residents of the respective states as alleged in said amended bill, admit that the plaintiff was at the time of the filing of said bill and still is a resident and citizen as in said bill set forth, and admit that each and all of the other defendants to this said cause were at the time of the filing of said bill residents and citizens of the respective states as alleged in said bill, excepting Alfred R. Dufrene, Thomas L. Kimball, and Royal Wilson who have since deceased, and James J. Brown, Jr., who died before said original bill was filed.

And these defendants further severally answerinng say that they deny that it is true that in the year 1894 until December, 1895, the said Union National Bank and the said American Na-

tional Bank, by means of their officers and agents, held repeated conferences with respect to the taking over of the business and office and office fixtures of the American National Bank by said Union National Bank, and the terms under which said arangement could be consummated, and deny that numerous meetings were held between the prominent stockholders of the two said banks, with that end in view.

And these answering defendants further severally answering say that they deny that in the month of December, 1895, the said American National Bank was in such a financial condition that it became necessary for it to provide in some manner for the payment of a large amount of its deposits on or
137 about January 1, 1896, and that it did not have on hands sufficient funds with which to meet the demands which it knew would be made upon it at that time, and which, if not paid, would precipitate a demand by all of its depositors, and thus bring on at once the failure of the bank, with all the attendant loss to the depositors, but admit that upon the happening of certain contingencies it might have become necessary for it to provide for the payment of a large amount of money to its depositors on or about said January 1, 1896.

And these defendants further severally answering say that they have been informed and believe it to be true that the amount of deposits at said time and for which the bank was liable upon call was the sum of $193,948.78, but deny it to be true that the amount of available cash to meet the same was only the sum of $36,979.78, but that they have been informed and believe it to be true and therefore aver that the amount of available cash and items equivalent to cash to meet the same was $49,000.00.

And these answering defendants further severally answering say that they have been informed and believe it to be true that negotiations were then (to-wit: in December, 1895) entered into by certain officers of the American National Bank with the Union National Bank of Omaha, Nebraska, for a transfer of the business of the said American National Bank to the said Union National Bank, and to ascertain whether or not some arrangement could be entered into whereby the immediate obligations of the American National Bank should be paid.

And these defendants further severally answering say that they have been informed and believe it to be true that as a result of the negotiations mentioned above and by and
138 under the direction of the Board of Directors of the said American National Bank as hereinafter more fully set forth, and the Board of Directors of the said Union National Bank the name of the American National Bank was affixed to

an instrument purporting to be a contract between said bank by Thomas L. Kimball who was then president of the American National Bank and attested by the defendant Henry F. Wyman who was then cashier of said American National Bank, and was signed by William W. Marsh, president, and attested by Chas. E. Ford, Cashier respectively of said Union National Bank; and believe that a copy of said purported contract is attached to said amended bill, but these defendants for greater certainty thereof pray leave to refer to said writing when the same shall be presented in Court.

And these defendants further jointly and severally answering say that they have been informed and believe it to be true that immediately after the signing of the said agreement the transfer of the business of the said American National Bank was made to the said Union National Bank pursuant to said agreement, and that the said Union National Bank at once assumed the payment of all the liabilities of the said American National Bank to its depositors and on account of its bills payable, but further say that they do not know and cannot set forth as to whether or not the said Union National Bank, long prior to the commencement of this action, has paid all of such deposits in full and therefore deny the same.

And these defendants further say that they do not know and cannot set forth as to their belief or otherwise whether the liabilities alleged in said amended bill were or have been
139 assumed by the said Union National Bank, and whether the items in cash, drafts and notes alleged to have been received by the Union National Bank from the American National Bank are fully and truly set forth therein, and whether or not a cashier's check of $39,929.51 was received by said Union National Bank from said American National Bank, and whether or not the same was paid by turning over to said Union National Bank notes for $22,299.10, and a cashier's check for $17,000.00, and whether or not the same was afterwards paid by the American National Bank; but admit that a cashier's check for some amount was received by said Union National Bank from said American National Bank, which check was paid by turning over to the said Union National Bank notes for an amount unknown to these answering defendants, and a cashier's check for an amount unknown to these answering defendants, which check was afterwards paid by said American National Bank.

And these defendants further jointly and severally answering say that they deny that the liabilities of the said American National Bank assumed by the said Union National Bank in excess of the assets of the said American National Bank taken and

accepted by the Union National Bank as cash, and without recourse, pursuant to the aforesaid alleged agreement, amounted to the sum of $201,000.00.

And these defendants further jointly and severally answering say that they deny that the American National Bank executed and delivered to the Union National Bank the three notes mentioned in said amended bill, but upon information and belief admit it to be true that on the 23rd day of December, 1895, the said Thomas L. Kimball, who was then President of the said American National Bank, executed and de-
140 livered to said Union National Bank three (3) promissory notes in the name of the American National Bank as maker, each of said notes being for the sum of $67,000.00, and bearing interest at the rate of six (6) per cent. per annum from date, one of said notes maturing in one year from date, one in two years from its date, and one in three years from its date.

And these defendants further severally answering say that they deny that the balance of the said assets of the said American National Bank, being all of the assets of the said American National Bank not taken by the said Union National Bank as cash, and without recourse, and in pursuance to and in performance of said agreement were turned over to one Thomas L. Kimball as trustee of the parties to said agreement to collect and convert the same into cash for the uses and purposes expressed in said agreement, but say that the balance of the assets of the said American National Bank were turned over to said Union National Bank pursuant to the terms of said agreement to liquidate the same.

And these defendants further jointly and severally say that they do not know, and have not been informed save by said complainant's bill and amended bill, and cannot set forth as to their belief or otherwise, whether on the 8th day of August, 1898, the said Union National Bank assigned and transferred said note due in one year from date to said plaintiff for a valuable consideration and whether or not said complainant is and was at the commencement of this action the legal holder and owner thereof, and whether or not a copy of said note with endorsements thereon is fully set forth in said amended bill, and therefore deny the same.

And these defendants further jointly and severally an-
141 swering say that they deny on information and belief that there is now due and owing on said note to said plaintiff from the American National Bank the sum of $....., or any sum whatever, and also deny on information and belief that the Union National Bank is a creditor of said American

National Bank, and that said Union National Bank is still the owner and holder of the two other notes in said amended bill described.

And these defendants further jointly and severally answering say that they deny that the defendants and each and every of them, were, and deny that each of them was advised of the situation and condition of the said American National Bank with respects to its liability to pay its depositors and liabilities at the time of the making of the agreement and notes set out in said amended bill, and that unless some arrangement was made to procure assistance for said American National Bank the said Bank could not pay its depositors, and that the loss under such circumstances would be very great, and deny that the liability of the stockholders would be greatly increased.

And these defendants further jointly and severally answering say that it is not true and they deny that they or either of them had any knowledge of the condition and liability of the said American National Bank as alleged in said bill, and that it is not true, and they deny that they or either of them accepted the benefits of such contract and ratified and affirmed the same, and that it is not true and they deny that they or either of them except as hereinafter set forth allowed and permitted the Union National Bank to pay out the said sums of money alleged in said amended bill to have been paid by the Union National Bank to the depositors of said American
142 National Bank, and that it is not true and they deny that they or either of them induced the Union National Bank to pay out the said sums of money alleged in said amended bill to have been paid by the Union National Bank to the depositors of the said American National Bank, and that it is not true and they deny that they or either of them accepted the benefit of said agreement and the payments of the same.

And these defendants further jointly and severally answering say that it is not true and they deny it to be a fact that by means of the actions and inducements of the officers and agents of the American National Bank and by means of the execution of said notes and contracts alleged in said amended bill to have been made by and with the consent, procurement and inducement of the said stockholders (which means, procurement and inducement these defendants deny) the defendants herein, these defendants or either of them, and with the knowledge and consent of the said defendants, or of these defendants or either of them, procured the Union National Bank to advance the money to pay off the liabilities of the American National Bank, and procured the Union National Bank to expend large sums

of money to pay off and satisfy said liabilities of said American National Bank and further say that it is not true and they deny it to be a fact that by means of such contract and notes the said defendants or either of them procured the said Union National Bank to expend the sum of $280,000.00 or any sum whatsoever in extinguishing, paying off and selling the obligations of the said American National Bank.

These defendants further severally and jointly answering say that it is not a fact and they deny it to be a fact
143 that these defendants or either of them was advised of the negotiations during the time the same were pending except as aforesaid and the purposes and designs of such negotiations and acquiesced in the same and consented thereto except as aforesaid.

And these defendants further jointly and severally answering say that they deny that at the time of the giving of the note described in said amended bill the said American National Bank delivered to said Thomas L. Kimball as trustee certain notes and property as security to the note sued on therein and other notes given to the said Union National Bank at the same time, and that said trustee was to collect said securities and apply the proceeds thereof to the payment of said notes, but admit that certain notes and property were at or about that time turned over to the Union National Bank to be liquidated and applied to the payment of said notes.

And these defendants jointly and severally admit that said Thomas L. Kimball has since the commencement of this suit deceased, but respectfully say that this court did not have any jurisdiction or authority to appoint James Burness as successor to said Thomas L. Kimball as trustee under said alleged contract, and further say that they do not know and have not been informed save by the said complainant's said amended bill and cannot set forth as to their belief or otherwise whether such assets have in fact all been turned over to said Burness.

And these defendants further jointly and severally answering say that they deny on information and belief that the American National Bank on the 14th day of January, 1896, or at any other time, went into voluntary liquidation
144 under the provisions of Section 5220 of the Revised Statutes of the United States, but admit on information and belief that since said time the said corporation, The American National Bank, has not done any banking business.

And these defendants further jointly and severally answering say that they deny that said complainant, Sumner Wallace, is a creditor of the said American National Bank.

And these defendants further jointly and severally answering say that they do not know and cannot set forth as to their belief or otherwise whether the respondents named in the Complainant's Amended Bill were shareholders of the American National Bank at the time it went into said alleged voluntary liquidation, and therefore deny the same, but admit that said American National Bank was capitalized for the sum of $200,000.00 divided into shares of $100.00 each, making in all 2000 shares of stock issued by the said bank; but cannot set forth, as to their belief or otherwise whether said plaintiff has or has not made defendants in this action all of the stockholders of the said American National Bank in so far as he has been able to ascertain the names thereof, but for the purpose of this action admit that he has.

And these defendants further jointly and severally answering say that they do not know and cannot set forth as to their belief or otherwise whether the said defendants named in said amended bill of complaint were the owners and holders of the respective number of shares set opposite their names in said amended bill, and therefore deny the same; but admit that the number of shares set out opposite the name of Alex. G. Charlton, to-wit: 20 shares, have been at all times
145 since the placing of said shares in the name of Alex. G. Charlton, Secretary, and still are owned by the said defendant, McCague Investment Company.

And these defendants further jointly and severally answering say that it is not true and they deny that the said American National Bank at the time it is alleged it went into voluntary liquidation, and during the months of December 1895 and January 1896 and for a long time prior thereto was wholly insolvent and unable to pay its creditors, and that said American National Bank has ever since remained and still is wholly insolvent and unable to pay its creditors.

And these defendants further jointly and severally answering say that they deny that this action is brought against the said American National Bank and its stockholders and under and through any authority granted by the laws of the United States relating to banking.

These defendants further jointly and severally answering say that they admit that under and by virtue of the banking laws of the United States each and every of said shareholders is held individually responsible, equally and ratably, and not one for another for all contracts, debts and engagements of the said American National Bank to the extent of the amount of his, her or its stock therein, at the par value thereof, in ad-

dition to the amount invested in such shares, but aver that such indebtedness or liability is limited to valid contract debts and engagements procured and entered into by said bank in the usual and ordinary course of the business of banking; and deny that each and every, or any of the stockholders of said American National Bank, and each and every or any of the respondents named in said amended bill as
146 stockholders are liable for the payment of the claim of plaintiff and the claim of the said Union National Bank to the amount of stock so held by said defendant or in any other amount or to any extent whatever.

And these defendants further jointly and severally answering say that the articles of association of the defendant the American National Bank of Omaha provide that the Board of Directors of said bank shall have authority to elect a president, vice-president, and such other officers and clerks as might be required to transact the business of such association, to fix the salaries of such officers and clerks, to dismiss such officers and clerks, and defines the duties of such officers and clerks, "and generally to do and perform all the acts that may be legal for a Board of Directors to do under the Revised Statutes aforesaid", to-wit: the Revised Statutes of the United States.

That Section 14 of the by-laws of said defendant the American National Bank of Omaha provide that special meetings of the board of directors might "be called by the president, cashier, or at the request of three or more directors."

That at a regular annual meeting of the stockholders of said defendant the American National Bank in Omaha held January 8, 1895, nine (9) persons were elected to serve as directors of said bank in accordance with the articles of association and by-laws of said bank.

That at a special meeting of the directors of said defendant the American National Bank of Omaha held on the 21st day of December, 1895, at which meeting there were present six (6) out of the nine (9) directors of said association, and of which special meeting no notice had been given to the
147 three directors not present, the following resolution was moved, seconded and unanimously adopted, to-wit:

"Whereas, the officers of this bank and the officers of the Union National Bank of Omaha, Nebraska, have negotiated and agreed upon the sale of this bank to the Union National Bank of the business and assets of this bank on the terms and conditions embodied in the agreement of which the following is a copy, to-wit:

That the American National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the first part has and by these presents does hereby agree for the consideration hereinafter expressed to and with the Union National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the second part, as follows, to-wit:

First. The party of the first part hereby agrees to sell and assign and does hereby sell and assign to the party of the second part the business of the party of the first part, its cash on hand, office furniture and fixtures, and such of its bills receivable as the party of the second part on examination may be willing to take as cash without recourse on the party of the first part.

Second. The party of the second part hereby agrees to purchase and does hereby purchase of the party of the first part the business of the party of the first part, cash on hand, office furniture and fixtures and such bills receivable as the party of the second part may be willing to take as cash on examination of the same without recourse on the party of the first part and to pay the party of the first part for said office furniture and fixtures the sum of $3750.00, and to assume the
148 liabilities of the party of the first part to its depositors, and on account of its bills payable, and to liquidate the remaining assets of the party of the first part which may not be taken and received as cash by the party of the second part without charge or expense to the party of the first part, except such court charges and attorney's fees as may be found necessary and that such liquidation shall be conducted under the direction of Thomas L. Kimball or such other person as may be agreed upon on behalf of the stockholders of the party of the first part, it being understood and agreed that said Kimball, or his successor, shall represent in said liquidation the stockholders of the party of the first part, and shall receive, hold and use the proceeds of the assets of the party of the first part as trustee of the parties hereto for the mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary court charges and attorneys fees attending said liquidation shall be incurred under the direction of the said Kimball or his successor.

Third. In consideration of the above agreement of the party of the second part, the party of the first part hereby agrees to retain and pay one-half of the loss and expense which the party of the second part may sustain on account of the removal from its present quarters by reason of its unexpired lease on its present place of business and one-half of the loss which the party of the second part may sustain on the sale of its

office furniture and fixtures, which furniture and fixtures are agreed upon at the present price and value of $3750.00, and the party of the first part further agrees to guarantee and does hereby [guaranty] the party of the second part against any and all loss on account of assuming the liabilities of the
149 party of the first part as aforesaid; and to this end the party of the first part agrees to execute and deliver to the party of the second part its three promissory notes of equal sums for the amount of the liabilities which the party of the second part may assume after crediting the full amount of cash on hand and bills receivable and other assets which may be accepted by the party of the second part on examination, which notes shall draw interest from date at the rate of 6% per annum, payable quarter annually, and be payable in one, two and three years from date, respectively, and shall be non-negotiable; and in case of non-payment of any of said notes when due, the whole of said principal sum of all of said notes and accrued interest shall thereupon become due. And as further security to the party of the second part the party of the first part agrees to sell and assign, and does hereby sell and assign to the party of the second part all of its assets which may remain after the selection thereof by the party of the second part heretofore mentioned, including all its bills payable, stocks, bonds, personal property of every kind, and all real estate and rights and interests therein or liens thereon, with the understanding and agreement that the party of the second part shall have and hold said assets and properties subject to the right of said Thomas L. Kimball, or his successor, to collect and convert the same into cash for the uses and purposes heretofore expressed.

And it is further agreed that the party of the first part may pay and have credited on said notes at any time prior to maturity any sums of money of $500.00 and upwards, provided the sums so paid shall be in even hundreds.

150 Witness the names and corporate seals of the parties hereto this 21st day of December, A. D. 1895.

Now Therefore, Resolved, that the foregoing agreement be and the same is hereby ratified and confirmed, and that the officers of the bank be and are hereby authorized to execute said agreement and carry the same into effect for and on behalf of this bank, and that the officers of this bank be and are hereby authorized to execute and deliver to the Union National Bank the notes of this bank in the sums which may be required to comply with the terms of the foregoing agreement."

That thereupon on said 21st day of December the said Thomas L. Kimball who was then president of the said Ameri-

can National Bank entered into an agreement in the name of the American National Bank of Omaha with the defendant the Union National Bank of Omaha, and which agreement was attested by the defendant Henry F. Wyman, who was then the cashier of said American National Bank, a copy of which is as these defendants are informed and believe attached to plaintiff's amended bill as "Exhibit A", and these defendants for greater certainty therein pray leave to refer to the original thereof when the same shall be produced.

That immediately after the execution and delivery of said agreement and the said resolution said Thomas L. Kimball and Henry F. Wyman delivered and turned over to said Union National Bank all of the assets then owned by the said American National Bank, and that said Union National Bank and said Thomas L. Kimball thereupon took complete and exclusive possession and control of such assets and proceeded to and did reduce certain portions thereof (but what and how much are unknown to these defendants) to cash; that whatever
151 payments that have been made upon any of the three notes mentioned in said amended bill of complaint have been made out of such assets so transferred and delivered; and that the assets of the American National Bank so turned over and delivered to the said Union National Bank not including the business, cash on hand, office furniture and fixtures, and bills receivable accepted by the said Union National Bank as cash were of the nominal or face value of about $400,000.00, and of these assets there remains in the hands of the said Union National Bank and Thomas L. Kimball up to the time of his death and now remain in the hands of said Union National Bank and said James Burness assets of the nominal or face value of about the sum of $371,000.00 which have not been liquidated or converted into money or in any manner applied upon the plaintiff's said claim.

That immediately after the execution and delivery of said instrument said Union National Bank of Omaha removed from its former place of business, to-wit: on the southeast corner of 16th and Dodge Streets in the City of Omaha to the place of business of the American National Bank, to-wit: on the northwest corner of 15th and Dodge Streets in said city, and took possession of and has since retained possession of the offices, furniture and fixtures of the said American National Bank and its said place of business, leaving its own office furniture and fixtures and place of business theretofore occupied by it and by its removal left vacant for a long time thereafter, and that said office furniture and fixtures of said Union National Bank were not as valuable as said office furniture and fixtures of said American National Bank.

152 That thereafter on the 25th day of December, 1895, the said Thomas L. Kimball who was then president of said American National Bank executed and delivered to the said Union National Bank three promissory notes in the name of the said American National Bank as maker for the sum of $67,000.00 each, due in one, two and three years respectively, and of which said three notes the note set out in plaintiff's amended bill is the one first maturing.

These defendants jointly and severally aver upon information and belief that there are and were persons other than said Union National Bank and said plaintiff who were and still are creditors of said American National Bank.

These defendants further jointly and severally answering say that no proceedings have been had at law upon the three notes above mentioned or either of them, and that said plaintiff has not reduced [has] said claim founded upon the note set out in his amended bill to judgment in any court.

These defendants jointly and severally further answering aver that said alleged contract heretofore described was beyond the scope and power of the said The American National Bank and the defendant the Union National Bank, was an act ultra [viris], and that said contract is illegal and void and of no force or effect; that no consideration has ever been paid or given for said three promissory notes heretofore described, or either of them, and that said notes are without consideration and are null and void, and were given for the sole and only purpose that it might appear that the said Union National Bank had larger assets than it would otherwise show by its books and for the further purpose of satisfying
153 the requirements of the Comptroller of the Currency of the United States and the national bank examiners, because of the payment of the large payment of cash by reason of the assumption of the obligations under said contract heretofore referred to of the Union National Bank and to the depositors of the American National Bank, which said payment without said notes as assets would impair the credit of said Union National Bank.

These defendants jointly and severally further allege that in the year 1893 the said capital of the said The American National Bank of Omaha became impaired, and that on the ..... day of ....., 1893, the Comptroller of the Currency of the United States under and by virtue of the authority granted by the National Banking Laws of the United States levied or caused to be levied an assessment upon each of said shareholders individually, named in plaintiff's amended bill

of complaint, equally and ratably, and not one for another, to the amount of twenty-five (25) per cent of his, her or its stock therein at the par value thereof in [addotion] to the amount invested in such shares, and that each and every of said stockholders of said American National Bank paid, or caused to be paid said assessment of 25 per cent, so levied and assessed of his, her or its said stock.

And these defendants further severally answering say that they are informed and believe it to be true and therefore aver that by reason of the facts hereinbefore set forth these defendants are not and cannot be held liable under the laws of the United States for the payment of said notes or any portion thereof.

Wherefore these defendants severally humbly pray to be hence dismissed with their reasonable costs and charges
154 in this behalf most wrongfully sustained.

CHAS. BATTELLE,
Counsel for said Answering Defendants.

Indorsed: Filed Jun. 14, 1901. Geo. H. Thummel, Clerk.

155 Thereupon afterwards, to-wit: On the 29th day of June, 1901, an Answer was filed in said case, which said Answer is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

Sumner Wallace, Plaintiff,
Doc. T vs. No 261. In Equity.
The American National Bank et al., Defendants.

The joint and several answer of Charles W. Morton, George Morton, James H. Morton and Mary E. Morton, four of the defendants to the Amended Bill of Complaint of Sumner Wallace.

These defendants respectively, now and at all times hereafter reserving to themselves all right of exception to said complainant's said amended Bill of Complaint, for answer thereto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, say:

That they severally admit that the American National Bank and the Union National Bank are corporations organized under and by virtue of the banking laws of the United States for the purpose of doing business in the City of Omaha, Douglas

County, Nebraska; deny that said banks are within the jurisdiction of the Circuit Court of the United States within and for the District of Nebraska as national banks; admit that each of these answering defendants is a resident and citizen of the State of Nebraska; admit that the plaintiff is a resi-
156 dent and citizen of the state therein set forth; and admit that all of the parties were at the time of the filing of the bill in this cause, and still are, residents and citizens as in said amended bill averred, except Alfred R. Dufrene and Thomas L. Kimball, who have since deceased, and James J. Brown, Jr., who died before said original bill was filed.

And these defendants further severally answering say, that they deny that it is true that in the year of 1894, until December, 1895, the said Union National Bank and the said American National Bank by means of their officers and agents held repeated conferences with respect to the taking over of the business and office fixtures of the American National Bank by said Union National Bank and the terms under which the said arrangement could be consummated, and deny that numerous meetings were held between the prominent stockholders of the two said banks with that end in view.

And these defendants further severally answering say, that they deny that in the month of December, 1895, the American National Bank aforesaid was in such a financial condition that it became necessary for it to provide in some manner for the payment of a large amount of its deposits on or about January 1st, 1896, and deny that it did not have on hand sufficient funds with which to meet the demands which it knew would be made upon it at that time.

And these defendants further severally answering say, that they have been informed and believe it to be true, that the amount of, deposits at said time, and for which the bank was liable upon call, was the sum of $193,949.78, but deny it to be true that the amount of available cash to meet the
157 same was only the sum of $36,979.78, and say that they have been informed and believe and aver it to be true that the amount of available cash and items equivalent to cash was about the sum of $49,000.00.

And these defendants further severally answering say, that they have been informed and believe it to be true that negotiations were then (to-wit, in December, 1895) entered into by the officers of the bank (to-wit, the American National Bank) with the Union National Bank of Omaha, Nebraska, for a transfer of the business of the said American National Bank to the said Union National Bank, and to ascertain whether or not some

arrangement could be entered into whereby the immediate obligations of the American National Bank should be paid.

These defendants further severally answering say, that they have been informed and believe it to be true that as a result of the negotiations mentioned above, and by and under the direction of the Board of Directors of the said American National Bank, as hereinafter more fully set forth, and the Board of Directors of the said Union National Bank, the name of the American National Bank was affixed to an instrument, purporting to be a contract between said banks, by Thomas L. Kimball, who was then president of the American National Bank, and attested by the defendant, Henry F. Wyman, who was then cashier of the said American National Bank, and was signed by William W. Marsh, president, and attested by Charles E. Ford, cashier, respectively, of said Union National Bank; and believe that a copy thereof is attached to said amended bill, but these defendants for greater certainty therein pray to refer to said writing when same shall be produced.

158 And these defendants further severally answering say, that they have been informed and believe it to be true, that immediately after the signing of said agreement the transfer of the business of the said American National Bank was made to the said Union National Bank, pursuant to said agreement and that the said Union National Bank at once assumed the payment of all the liabilities of the said American National Bank to its depositors and on account of its bills payable, but further say that they do not know and have not been informed save by the said complainant's said amended bill, whether or not the said Union National Bank long prior to the commencement of this action has paid all of such deposits in full, and therefore deny that it has.

And these defendants further severally answering say, that they do not know and have not been informed save by said complainant's said amended bill and cannot set forth as to the belief or otherwise whether the items of liabilities alleged in said amended bill to have been assumed by the Union National Bank and the items in cash, drafts and notes alleged to have been received by the Union National Bank from the American National Bank are fully and truly set forth therein, and whether or not a cashier's check of $39,929.51 was received by said Union National Bank from said American National Bank and whether or not the same was paid by turning over to the said Union National Bank notes for $22,299.10 and a cashier's check for $17,000.00 and whether or not the same was afterwards paid by the American National Bank.

These defendants further severally answering say, that they deny that the liabilities of the said American National Bank assumed by the said Union National Bank in excess of the assets of the said American National Bank taken and
159 accepted by the Union National Bank as cash and without recourse, pursuant to the alleged agreement therein set forth, amounted to the sum of $201,000.00.

And these defendants further severally answering say, that they deny that the American National Bank executed and delivered to the Union National Bank the three notes mentioned in said amended bill but further say, that they have been informed and believe it to be true, that on the 23rd day of December, 1895, the said Thomas L. Kimball, who was then president of said American National Bank, executed and delivered to said Union National Bank three promissory notes in the name of the American National Bank as maker, each of said notes being for the sum of $67,000.00 and bearing interest at the rate of six per cent per annum from date, one of said notes maturing in one year from its date, one in two years from its date and one in three years from its date.

And these defendants further answering say, that they deny that the balance of the assets of the said American National Bank, being all of the assets of the said American National Bank not taken by the said Union National Bank as cash and without recourse and in pursuance to and in performance of said agreement, were turned over to one Thomas L. Kimball as trustee of the parties to said agreement to collect and convert the same into cash for the uses and purposes expressed in said agreement, but say that the balance of the assets of said American National Bank were turned over to said Union National Bank pursuant to the terms of said agreement to liquidate the same.

And these defendants further severally answering say, that they do not know and have not been informed save by said complainant's said amended bill and cannot set forth
160 as to their belief or otherwise, whether on the 8th day of August, 1898 the said Union National Bank sold, assigned and transferred said note due in one year from date to said plaintiff for a valuable consideration and whether or not said plaintiff is and was at the commencement of this action the legal owner and holder thereof, and whether or not a copy of said note with endorsements thereon is fully set forth in said amended bill, and therefore deny the same.

These defendants further severally answering say, that they deny on information and belief that there is now due and owing on said note to said plaintiff from the American National

Bank the sum of $....., or any sum whatsoever, and also deny on information and belief that the Union National Bank is a creditor of said American National Bank and that said Union National Bank is still the owner and holder of the two other notes in said amended bill described.

And these defendants further severally answering say, that it is not true and they deny that these defendants were or either of them was advised of the situation and condition of the said American National Bank with respect to its alleged inability to pay its depositors and liabilities at the time of the making the agreement and notes set out in said amended bill and that it is not true and they deny that unless some arrangement was made to procure assistance for said American National Bank the said bank could not pay its depositors and that the loss under such circumstances would be very great, and that the [inability] of the stockholders would be greatly increased.

And these defendants further severally answering say, that it is not true and they deny that they or either of them
161 had any knowledge of the alleged condition and liability of said American National Bank, and that it is not true and they deny that they or either of them accepted and received the benefits of such contract and ratified and affirmed the same, and that it is not true and they deny that they or either of them allowed, permitted and induced the Union National Bank to pay out the said sums of money alleged in said amended bill to have been paid by the Union National Bank to the depositors of said American National Bank, and that it is not true and they deny that they or either of them accepted the benefits of said agreement and the payments of the same.

These defendants further severally answering say, that it is not true and they deny it to be a fact, that by means of the actions and inducements of the officers and agents of the American National Bank (if any such there were, which they deny) and by means of the execution of said notes and contract alleged in said amended bill to have been made by and with the consent, procurement and inducement of the said stockholders (which consent, procurement and inducement these defendants deny), the defendants herein, or these defendants or either of them, and with the knowledge and consent of the said defendants, or of these defendants or either of them, procured the Union National Bank to advance the money to pay off the liabilities of the American National Bank and procured the Union National Bank to expend large sums of money to pay off and satisfy said liabilities of said American Na-

tional Bank, and further say that it is not true and they deny it to be a fact that by means of such contract and notes the said defendants or either of them procured the said
162 Union National Bank to expend the sum of over $280,000.00 or any sum whatsoever in extinguishing, paying off or settling the obligations of the said American National Bank.

And these defendants further severally answering say, that it is not a fact and they deny it to be a fact that these defendants were or either of them was advised of the negotiations during the time the same were pending, and the purpose and design of such negotiations and acquiesced in the same and consented thereto.

And these defendants further severally answering say, that they deny that at the time of the giving of the notes described in said amended bill the said American National Bank delivered to said Thomas L. Kimball, as trustee, certain notes and property as security to the notes sued on therein and other notes given to the said Union National Bank at the same time, and that said trustee was to collect said security and apply the proceeds thereof to the payment of said notes, but admit that certain notes and property were at or about that time turned over to the Union National Bank to be liquidated and applied to the payment of said notes.

And these defendants further severally answering say, that they admit that said Thomas L. Kimball has since the commencement of this suit deceased, but respectfully say that this court did not have any jurisdiction or authority to appoint James Burness as successor to said Thomas L. Kimball as trustee under said alleged contract, and further say that they do not know and have not been informed save by the said complainant's said amended bill and cannot set forth as to their belief or otherwise, whether such assets have in fact all been turned over to said Burness.

163 And these defendants further severally answering say, that they deny on information and belief that the American National Bank on the 14th day of January, 1896, or at any other time, went into voluntary liquidation under the provisions of Sec. 5220 of the Revised Statutes of the United States, but admit on information and belief that since said time the said corporation, the American National Bank has not done any banking business.

And these defendants further severally answering say, that they deny that said plaintiff is a creditor of the said American National Bank.

And these defendants further severally answering say, that they admit that the said American National Bank was capitalized for the sum of $200,000.00 divided into shares of $100.00 each, making in all 200 shares of stock issued by the said bank.

And these defendants further severally answering say, that they do not know and have not been informed save by the said complainant's said amended bill, and cannot set forth as to their belief or otherwise, whether the said plaintiff has or has not made defendants in this action all of the stockholders of said American National Bank in so far as he has been able to ascertain the names thereof, but for the purposes of this action admit that he has.

These defendants further severally answering say, that they admit that the said Elmer C. Brownlee, and Peter Frenzer and John N. Frenzer and Howard B. Smith were, at the times mentioned in said amended bill and still are shareholders of the said American National Bank to the number respectively of ten and fifteen and five and fifty shares as stated in said amended bill.

164 And these defendants further severally answering say, that they admit on information and belief that the other defendants named in said amended bill were the owners and holders of the number of shares set opposite their names respectively therein.

And these defendants further severally answering say, that it is not true and they deny that the said American National Bank at the time it is alleged it went into voluntary liquidation and during the months of December, 1895 and January 1896, and for a long time prior thereto, was wholly insolvent and unable to pay its creditors, and that said American National Bank has ever since remained and still is wholly insolvent and unable to pay its creditors.

And these defendants further severally answering say, that they deny that this action is brought against the said American National Bank and its stockholders jointly under and through any authority granted by the laws of the United States relating to banking.

These defendants further severally answering say, that they admit that under and by virtue of the banking laws of the United States, each and every of said shareholders is held individually responsible equally and ratably, and not one for another, for all contracts, debts, and engagements of the said American National Bank to the extent of the amount of his, her or its stock therein, at the par value thereof; in addition

to the amount invested in such shares; but aver that such indebtedness or liability is limited to valid contracts, debts and engagements incurred and entered into by said bank in the usual and ordinary course of the business of banking; and deny
165 that each and every or any of the stockholders of the said American National Bank and each and every or any of the respondents named in said amended bill as stockholders, are liable for the payment of the claim of plaintiff and of the claim of the said Union National Bank to the amount of stock so held by said defendants or to any other amount or to any extent whatsoever.

And these defendants further severally answering say, that the Articles of Association of the defendant, the American National Bank of Omaha, provided that the Board of Directors of said bank should have authority to elect a president, vice-president and such other officers and clerks as might be required to transact the business of such Association, to fix the salaries of such officers and clerks, to dismiss such officers and clerks, to define the duties of such officers and clerks, "and, generally, to do and perform all the acts that may be legal for a Board of Directors to do under the Revised Statutes aforesaid," to-wit: the Revised Statutes of the United States.

That section 14 of the by-laws of said defendant, the American National Bank of Omaha, provided that special meetings of the Board of Directors might "be called by the President, Cashier or at the request of three or more directors."

That at a regular annual meeting of the stockholders of said defendant, the American National Bank of Omaha, held January 8, 1895, nine persons were elected to serve as directors of said bank in accordance with the Articles of Association and By-laws of said bank.

That at a special meeting of the directors of said defendant, the American National Bank of Omaha, held on the 21st day of December, 1895, at which meeting there were present
166 six out of the nine directors of said Association and of which special meeting no notice had been given to the three directors not present, the following resolution was moved, seconded and unanimously adopted, to-wit:

"Whereas, the officers of this bank and the officers of the Union National Bank of Omaha, Nebraska, have negotiated and agreed upon the sale of this bank to the Union National Bank of the business and assets of this bank on the terms and conditions embodied in the agreement, of which the following is a copy:

Agreement.

This Indenture Witnesseth: That the American National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the first part, has and by these presents does hereby agree, for the consideration hereinafter expressed, to and with Union National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the second part, as follows, to-wit:

First. The party of the first part hereby agrees to sell and assign and does hereby sell and assign to the second party the business of the party of the first part, its cash on hand, office furniture and fixtures and such of its bills receivable as the party of the second part on examination may be willing to take as cash without recourse on the party of the first part.

Second. The party of the second part hereby agrees to purchase and does purchase from the party of the first part the business of the party of the first part, cash on hand, office furniture and fixtures, and such bills receivable as the party of the second part may be willing to take as cash on examination of the same without recourse for said office furniture
167 and fixtures the sum of Three Thousand seven hundred and fifty ($3750.00) and to assume the liabilities of the party of the first part to its depositors and on account of its bills payable and to liquidate the remaining assets of the party of the first part which may not be taken and received as cash by the party of the second part without charge or expense to the party of the first part, except such court charges and attorneys' fees as may be found necessary and that such liquidation shall be conducted under the direction of Thomas L. Kimball or such other person as may be agreed upon on behalf of the stockholders of the party of the first part, it being understood and agreed that said Kimball or his successors shall represent in said liquidation the stockholders of the party of the first part, and shall receive, hold and use the proceeds of the assets of the party of the first part as trustee of the parties hereto for the mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary court charges and attorneys' fees attending said liquidation shall be incurred under the directions of the said Kimball, or his successor.

Third. In consideration of the above agreement of the party of the second part, the party of the first part hereby agrees to sustain and pay one half of the loss and expense which the party of the second part may sustain on account of

removal from its present quarters by reason of its unexpired lease on its present place of business, and one-half of the loss which the party of the second part may sustain on the sale of its office furniture and fixtures, which furniture and fixtures
are agreed upon at the present price and value of three
168 thousand seven hundred and fifty ($3750.00) dollars,
and the party of the first part further agrees to guarantee and does hereby guarantee the party of the second part against any and all loss on account of assuming the liabilities of the party of the first part as aforesaid. And to this end the party of the first part agrees to execute and deliver to the party of the second part its three promissory notes of equal sums for the amount of liabilities which the party of the second part may assume after crediting the full amount of cash on hand and bills receivable and other assets which may be accepted by the party of the second part on examination, which notes shall draw interest from date at the rate of six per cent per annum, payable quarter annually, and be payable in one, two or three years from date respectively, and shall be non-negotiable. And in case of non-payment of any of said notes when due the whole of said principal sums of all of said notes and accrued interest shall thereupon become due.

And as further security to the party of the second part the party of the first part agrees to sell and assign and does hereby sell and assign to the party of the second part all of its assets which may remain after the selection therefrom by the party of the second part hereinbefore mentioned, including all its bills receivable, stocks, bonds, personal property of every kind and all real estate and interests therein or liens thereon, with the understanding and agreement that the party of the second part shall have and hold said assets and properties subject to the right of said Thomas L. Kimball, or his successor, to collect and convert the same into cash for the uses and purposes hereinbefore expressed.

And it is further agreed that the party of the first
169 part may pay and have credited on said notes at any
time prior to maturity any sums of money of five hundred ($500.00) dollars and upwards, provided the sums so paid shall be in even hundreds.

Witness the names and corporate seals of the parties hereto this 21st day of December, A. D. 1895.

Now, therefore, Resolved that the foregoing agreement be and the same is hereby ratified and confirmed and that the officers of the bank be and are hereby authorized and directed to execute said agreement and carry the same into effect for and on

behalf of this bank, and that the officers of this bank be and are hereby authorized to execute and deliver to the Union National Bank the notes of this Bank in the sums which may be required to comply with the terms of the foregoing agreement."

That thereupon, on said 21st day of December, 1895, said Thomas L. Kimball, who was then president of said American National Bank, entered into an agreement in the name of said American National Bank of Omaha with the defendant, the Union National Bank of Omaha, and which agreement was attested by the defendant, Henry F. Wyman, who was then the cashier of said American National Bank, a copy of which is, as these defendants are informed and believe, attached to plaintiff's amended bill as "Exhibit A" and these defendants for greater certainty therein pray leave to refer to the original thereof, when the same shall be produced.

That immediately after the execution and delivery of said agreement and pursuant thereto, and to said resolution, said Thomas L. Kimball and Henry F. Wyman, delivered and turned over to said Union National Bank all of the assets then owned by said American National Bank and that said
170 Union National Bank and said Thomas L. Kimball, thereupon took complete and exclusive possession and control of such assets and proceeded to and did reduce certain portions thereof (but what and how much are unknown to these defendants) to cash; that whatever payments have been made upon any of the three notes mentioned in said amended bill of complaint have been made out of such assets so transferred and delivered; and that the assets of the American National Bank so turned over and delivered to the said Union National Bank, not including the business, cash on hand, office furniture and fixtures and bills receivable accepted by the said Union National Bank as cash, were of the nominal or face value of about $400,000.00, and of these assets there remained in the hands of the said Union National Bank and said Thomas L. Kimball up to the time of his death, and now remain in the hands of said Union National Bank and said James Burness assets of the nominal or face value of about the sum of $371,000.00, which have not been liquidated or converted into money or in any manner applied upon the plaintiff's said claim.

That immedately after the executon and delivery of said instrument, said Union National Bank of Omaha removed from its former place of business, to-wit: on the southeast corner of 16th and Dodge Streets in the City of Omaha, to the place of business of the American National Bank, to-wit: on the northwest corner of 15th and Dodge Streets in said city,

and took possession of and has ever since retained possession of the office furniture and fixtures of said American National Bank and its said place of business, leaving its own office furniture and fixtures in the place of business theretofore occupied by it and by its removal left vacant for a long time
171 thereafter, and that said office furniture and fixtures of said Union National Bank were not as valuable as said office furniture and fixtures of said American National Bank.

That afterwards, on the 25th day of December, 1895, the said defendant, Thomas L. Kimball, who was then President of said American National Bank, executed and delivered to the said Union National Bank three promissory notes in the name of the said American National Bank, as maker, for the sum of $67,000.00 each, due in one, two and three years respectively, and of which said three notes the note set out in plaintiff's amended bill is the one first maturing.

That at the times mentioned in said amended bill and at the times herein mentioned there were and still are persons, other than said Union National Bank and said plaintiff, who were and still are creditors of said American National Bank.

That the directors present at said special directors' meeting were Thomas L. Kimball, holding 10 shares of the stock of said bank, William Baird, holding 10 shares, Charles C. George holding 15 shares, M. Levy holding 50 shares, Alfred R. Dufrene holding 75 shares and A. U. Wyman holding 10 shares; that said Thomas L. Kimball had on deposit on said day to his credit in said American National Bank an amount in excess of $15,000.00; that said M. Levy had on deposit on said day in said bank to his own credit an amount in excess of $150.00 and the Nebraska Clothing Company, of which said Levy was president and manager and in which he was a large shareholder, had on deposit on said day to its credit in said bank an amount in excess of $19,000.00; and that said Alfred R. Dufrene had on deposit on said day in said bank to
172 his credit an amount in excess of $2,000.00 and Mrs. A. R. Dufrene, his wife, had on deposit in said bank on said day to her credit an amount in excess of $2,300.00; that said William Baird at said time was a partner in the firm of Wharton & Baird and said Baird was individually and as a member of said partnership the attorney for William Minot and the representative in said bank of said Minot's interests and that said Wharton & Baird had on deposit to their credit in said bank on said day an amount exceeding $700.00 and were attorneys for said Union National Bank, and said Minot had on deposit to his credit on said day in said American Na-

tional Bank the amount of $50,000.00; that said Thomas L. Kimball and said Alfred R. Dufrene were, as a part of the transaction hereinbefore set forth, elected directors of said Union National Bank and were ever since such time up to the times of their decease, such directors; that, as these defendants are informed and believe, said Union National Bank and the officers thereof had actual knowledge of the amounts standing to the credit of the several persons, firms and corporations above mentioned as depositors in said American National Bank and the relations between them; but that, if said Union National Bank and the officers thereof did not have actual knowledge (but which these defendants do not admit) of the exact amounts to the credit of said directors and said other persons and corporations as depositors in said American National Bank and the relations between them, it and they ought to have known the same and could have discovered the same upon the exercise of reasonable diligence in the premises; and that said Kimball, Baird, Levy and Dufrene were a majority of the directors present at said special directors' meeting and said resolution could not have been adopted
173 without their votes or the votes of at least three of them.

That said meeting of said Board of Directors on December 21, 1895, was held and said resolution adopted at such meeting and said agreement signed and delivered and said assets delivered and said notes signed and delivered without the knowledge or consent of these defendants or either of them.

And these defendants further severally answering say, that no proceedings have been had at law upon the three notes above mentioned or either of them, and that said plaintiff has not reduced his said claim founded upon the note set out in his amended bill to judgment in any court.

And these defendants further severally answering say, that they are informed and believe it to be true and therefore aver that by reason of the facts hereinbefore set forth these defendants are not and cannot be held liable under the laws of the United states for the payment of said notes or any portion thereof.

Wherefore, these defendants severally humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

W. H. DeFRANCE,
Solicitor for Defts.

Indorsed: Filed Jun 29, 1901. Geo. H. Thummel, Clerk.

174 Thereupon afterwards, to-wit:—On the 2nd day of August, 1901, Answer of Union National Bank to Amended Bill of Complaint was filed in said case, which said Answer is in words and figures following, to-wit:—

United States Circuit Court Within and for the District of Nebraska.

Sumner Wallace, Complainant,
vs.
American National Bank, et al., Defendants.

Answer of the Union National Bank to the Amended Bill of Complaint.

Comes now the Union National Bank and for answer to the amended Bill of Complaint filed herein says, that it admits each and every allegation in said Bill of Complaint contained; and especially referring to that part of said Bill which alleges that this answering defendant is also a creditor of said American National Bank it admits said allegation to be true, and alleges that it is one of the creditors of said American National Bank, and adopts said Bill of Complaint and its allegations with reference to the liability of the stockholders of said Bank to the payment of the debts due the creditors of the same, and admits that it is still the owner and holder of two of the said three $67,000.00 notes alleged in said Amended Bill of Complaint to have been given by the said American National Bank under and by virtue of the agreement set out in said Amended Bill of Complaint, and that it herewith sets up and files its claim as such creditor, which claim arises as follows:

175 That at the time of the giving of the note set out in said Amended Bill of Complaint, and now owned by the Complainant, to-wit: on December 23rd, 1895, in addition to the said note set out in said Amended Bill of Complaint, the said American National Bank, under and by virtue of the contract set out in said Amended Bill of Complaint, made, executed and delivered to this answering defendant, the Union National Bank, its two certain other promissory notes for the said sum of $67,000.00 each, one payable two years after date, and the other three years after date, copies of which notes, with all endorsements thereon are as follows:

"$67,000.00 Omaha, Neb., Dec. 23", 1895.

Two years after date, for value received, we promise to pay to The Union National Bank, Sixty-seven Thousand Dollars

at its Banking Office in Omaha, Neb., with interest at 6 per cent per annum from date, payable quarterly until paid.

THE AMERICAN NATIONAL BANK,
Attest: By Thos. L. Kimball, President.
Henry F. Wyman, Cas.

No. 7398.
Due Dec. 23, 1897".

Endorsed: Int. paid to Mar. 23, 1896,
Int. paid to June 23, 1896,
Int. paid 2-17-97 to Sept. 23, 1896,
4-16-97 Int. paid to Mch. 23, 1897".

$67,000. Omaha, Neb., Dec. 23, 1895.

Three years after date for value received, we promise to pay to The Union National Bank Sixty Seven Thousand Dollars at its Banking Office in Omaha, Neb., with interest at 6 per cent per annum from date payable quarterly until paid.

THE AMERICAN NATIONAL BANK,
Attest: By Thos. L. Kimball, Pres.
Henry F. Wyman, Cas.

No. 7399.
Due Dec. 23, 1898.

176 Endorsed: "Int. paid to Mch. 23, 1896,
Int. paid to June 23, 1896,
Int. paid to Dec. 23, 1896.
4-16 Int. paid to Mch. 23, 1897".

And this answering defendant says that it is still the legal owner and holder of said notes and entitled to the proceeds thereof.

That no part of said notes has been paid, except the interest on each of said notes has been paid to March 23, 1897.

That under and by virtue of an agreement set out in said Amended Bill of Complaint between the said American National Bank and this answering defendant all of said notes, including the one owned by the complainant, were to become due and payable at once upon the non-payment of any of said notes when due, and that all of said notes were due at the commencement of this action; and there is now owing from the said American National Bank, and from the stockholders thereof who are made defendants in this action, to this answering defendant the sum of $134,000.00, together with interest thereon at the rate of six per cent per annum from the 23rd day of March, 1897, according to the tenor and effect of said notes.

And this answering defendant and claimant further says that it admits that at the time of the giving of the note described in said amended Bill of Complaint, the said American National Bank delivered to Thomas L. Kimball, as Trustee, certain notes and property as security to the notes sued on therein and to the other notes given to this answering defendant at the same time, and that said Trustee was to collect such security and apply the proceeds thereof to the payment of said notes, and that this defendant claims in this action, as a creditor and as one of the creditors for and on behalf
177 of whom the said complainant brings his suit, all of the benefits arising and accruing from and by virtue of said agreement between the said American National Bank and the said Union National Bank, as fully set out in said Amended Bill of Complaint.

And this answering defendant admits that the assets covered by said agreement should, as alleged in said amended Bill of Complaint, be brought into this Court to be and abide the order of this Honorable Court in and about the same, as equity and good conscience may require, so that full and complete justice may be done herein in the assessment and judgment prayed in said Amended Bill of Complaint, and in the final liquidation of said Bank, and in the distribution of its assets in the final decree herein.

And this answering defendant further alleges and says that under the distribution of said assets, by and under the direction of this Court, and the proper application made of the proceeds thereof to the payment of the indebtedness due the said Complainant and this answering defendant that proper and necessary assessments should be made against the stockholders of said American National Bank as requested and prayed for in the said Amended Bill of Complaint.

Wherefore this answering defendant and claimant prays that the amount due upon said notes hereinbefore set out may be ascertained, and that said amount may be allowed as a claim in favor of the Union National Bank against the said American National Bank; and that the said Union National Bank may be declared by this Honorable Court to be one of the creditors of said American National Bank, for whose benefit said
178 Complainant avers his action was brought; and that the said Union National Bank, complainant, may have its claim allowed against the said American National Bank and may have and receive all of the benefits as such creditor prayed for by the Complainant herein for and on behalf of himself and all other creditors of said American National Bank; and

the said Union National Bank, claimant herein, prays for such other and further equitable relief as may be just and proper.

UNION NATIONAL BANK,
By Hall & McCulloch,
James H. Macomber,
Its Attorneys.

Indorsed: Filed Aug. 2, 1901. Geo. H. Thummel, Clerk.

179 Thereupon afterwards, to-wit:—On the 2nd day of August, 1901, Replication was filed in said case, which said Replication is in words and figures following, to-wit:—

U. S. Circuit Court,
District of Nebraska.

In the Circuit Court of the United States, in and for the District of Nebraska. In Equity.

Sumner Wallace,
No. 261. vs. Doc. "T".
American National Bank, et al.

The replication of Sumner Wallace plaintiff to the answer of each and all defendants who have answered said Amended Bill.

The replicant, saving and reserving to himself, all, and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answers of the defendants, for replication thereunto, says that he does and will aver, maintain and prove his said Amended Bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answers of the said defendants are very uncertain, evasive and insufficient in the law to be replied unto by the replicant; without that, that any other matter or thing in the said answers contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied is true; all which matters and things the replicant is ready to aver, maintain and prove, as this honorable Court shall direct, and humbly pray as in and by his said Amended Bill he has already prayed.

HALL & McCULLOCH, &
JAMES H. MACOMBER,
Solicitors for Complainant.

Indorsed: Filed Aug. 2, 1901. Geo. H. Thummel, Clerk.

180 Thereupon afterwards, to-wit:—On the 1st day of July, 1902, Stipulation was filed in said case, which said Stipulation is in words and figures following, to-wit:—

In the Circuit Court of the United States for the District of Nebraska.

Sumner Wallace, Plaintiff,
Doc. "T". vs. No. 261.
American National Bank, et al., Defendant.

Stipulation.

It is stipulated by and between the plaintiff and George G. Wallace, one of the defendants, that the joint and several answer of Elmer C. Brownlee filed February 4, 1901, may be so amended as to become and be an answer also for said George G. Wallace, and that the replication of the plaintiff heretofore filed to said joint and several answer, become and be a replication as to said George G. Wallace.

HALL & McCULLOCH,
Attorneys for Plaintiff.
HOWARD B. SMITH,
Attorney for George G. Wallace.

Indorsed: Filed Jul. 1, 1902. Geo. H. Thummel, Clerk.

181 Thereupon afterwards, to-wit:—At the May 1902 Term of said Court, and on the 1st day of July, 1902, the following proceedings were had and done in said case, as appear of record in Journal No. 1 of said Court, to-wit:—

Sumner Wallace,
261—T. vs.
American National Bank, et al.

This cause came to be heard and was fully argued by the attorneys for the respective parties and was submitted to the Court on the proofs.

182 Thereupon afterwards, to-wit:—On the 1st day of September, 1902, Memorandum Opinion was filed in said case, which said Memorandum Opinion is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

Sumner Wallace,
No. 261. vs. Doc. "T".
American National Bank, et al.

Memorandum Opinion.

Munger, D. J.

In this case I have concluded that before any adjudication can be made upon the question of the individual liability of the stockholders, all of the assets of the American National Bank must be disposed of; such seems to be the view taken by the Court of Appeal- in the 4th Circuit, in Williamson, et al., vs. American Bank, et al., 115th Federal 793. Before passing upon the question of the personal liability of the stockholders, the assets of the American National Bank must be disposed of. With this purpose in view, an order will be made directing the Trustee to dispose of the remaining assets at public sale, giving at least thirty days notice thereof by publication in both the Omaha World-Herald and Bee, and notice to each creditor and stockholder.

Counsel for complainant will prepare the proper order for this purpose.

Indorsed: Filed Sep. 1, 1902. Geo. H. Thummel, Clerk.

183 Thereupon afterwards, to-wit: At the November 1902 Term of said Court, and on the 9th day of December, 1902, the following Order Confirming Sale of Assets was signed and filed in said case and duly entered of record in Journal No. 1 of said Court, to-wit:

Sumner Wallace, Complainant,
No. 261. vs. Doc. "T".
The American National Bank, et al., Defendants.

Order Confirming Sale of Assets.

The report of James Burness, Trustee, having been filed in this Court on the 25th day of November, 1902, showing that on the 18th day of November, 1902, he sold at public sale to the Union National Bank of Omaha, Nebraska, for the sum of Eight Thousand Dollars, all of the assets of the American National Bank remaining in his hands as Trustee, including all the real estate owned by said American National Bank at the time it went into voluntary liquidation and still remaining unsold, and all notes, mortgages, securities and judgments

and other claims of said Bank of every description held against any and all persons whomsoever, which assets are fully described in detail in said report; and it appearing by the Court that the time limited by the Court in which objection to said sale should be filed has expired, and that no such objections have been filed, and that said sale was made in all respects in accordance with law and the course and practice of this Court, and in the manner provided by the order of this Court, therefore, it is by the Court

184 Ordered, Adjudged and Decreed that the said report of the said James Burness, Trustee, and the said sale by him made as set forth in his said report be, and the same is hereby approved and confirmed; and it is further

Ordered, Adjudged and Decreed that the said Trustee, upon the payment to him of said purchase price, make proper and legal assignments of all of the notes, mortgages, securities and judgments and other claims, and due, proper and legal conveyance or conveyances by deed of all the real estate so sold to the purchaser, such notes, mortgages, securities, real estate and other claims thus sold by said Trustee, confirmed by this Court and referred to herein being fully set out in detail in the report of said sale filed herein on the 25th day of November, 1902. It is further

Ordered that said Trustee account to this Court for the said $8,000 so received by him as the proceeds of said sale, together with the proceeds of any other property sold by him since his last report and prior to such sale, in his next report as Trustee to be filed.

W. H. MUNGER, Judge.

Indorsed: Filed Dec. 9, 1902. Geo. H. Thummel, Clerk.

185 Thereupon afterwards, to-wit: At the November 1902 Term of said Court and on the 3rd day of January, 1903, the following Order was signed and filed in said case, and duly entered of record in Journal No. 2 of said Court, to-wit:

Sumner Wallace, Complainant,
vs.
American National Bank, et al., Defendants.

Order Confirming Final Report of Trustee.

This cause this day came on for hearing upon the report of James Burness, Trustee, filed herein on the 27th day of December, 1902, praying for the allowance of the same and for his discharge:

Upon consideration whereof the Court finds that said report is in all things a correct and true report of the acts and doings of said trustee since his last report, filed December 19th, 1901;

The Court further finds that all parties in interest were duly notified of the filing of said report and that the same would come before the Court this 3d day of January, 1903, for approval or other order, and that no objections to the same have been filed but that certain defendants made oral objections to the allowance of the Trustee's fees for the year last past, to-wit: the sum of Nine Hundred Dollars, for the reason that said Trustee in addition to his duties as such had also been doing work for the Union National Bank; and the said Complainant, and the said Union National Bank agreeing thereto in open Court, the Court finds that Nine Hundred
186 Dollars ($900.00) of said compensation so charged in said report by said Trustee should be disallowed and the sum paid over and credited upon the notes of said Complainant and said Union National Bank, thus making the amount paid since the filing of the previous report, the sum of Fourteen Thousand Six Hundred Thirty-seven and 86-100 Dollars, ($14637.86) instead of Thirteen Thousand Seven Hundred Thirty-seven and 36-100 ($13737.86) as shown by the report now under consideration, it is therefore

Ordered, Considered and Adjudged by the Court that said report of said Trustee be and is hereby in all things confirmed except that the indebtedness of the American National Bank to the Complainant and the Union National Bank shall be credited with the sum of Fourteen Thousand Six Hundred Thirty-seven and 86-100 Dollars ($14637.86) instead of Thirteen Thousand Seven Hundred Thirty-seven and 86-100 Dollars ($13737.86) as shown in said report, and it is further

Ordered that said James Burness, having disposed of all the assets of the American National Bank under orders of this Court and he having no further duties to perform as such Trustee, is hereby discharged from his trust and his bond given in that behalf is hereby released and discharged.

By the Court,

W. H. MUNGER, Judge.

January 3d, 1903.

Indorsed: Filed Jan. 3, 1903. Geo. H. Thummel, Clerk.

187 Thereupon afterwards, to-wit: On the 24th day of April, 1903, Memorandum Opinion was filed in said case, which said Memorandum Opinion is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

Sumner Wallace, Complainant,
No. 261 "T". v.
American National Bank, et al., Respondents.

Memorandum Opinion.

Munger, D. J.

Under the facts in this case it appears that in December 1895, the board of directors of the American National Bank, while believing that the assets of the bank were amply sufficient to pay its liabilities, were fearful that its cash resources would be insufficient to meet the demands which would likely be made upon it during the coming period of a few days, and, further believing that it was for the interests of the bank that it should cease to do further business, they entered into a contract with the Union National Bank, by the terms of which they disposed of to the Union National Bank their furniture and certain assets, the Union National Bank agreeing to assume and pay off all of the liabilities of the American National Bank. As a consideration for the Union National Bank's assuming and paying the liabilities of the American National Bank, the American National Bank, in addition to the assets which it sold absolutely to the Union National Bank, executed to the Union National Bank, its three non-negotiable notes, payable in one, two and three years, and pledged as security for
188 the payment thereof the remaining assets of the bank, which were placed in the hands of Thomas Kimball, President of the American National Bank, as trustee, the proceeds of the assets to be applied in discharge of said notes. This contract was executed. The Union National Bank, in pursuance of its agreement, liquidated and paid off the entire indebtedness of the American National Bank. Subsequent to this agreement on the part of the board of directors a stockholder's meeting was held of the American National Bank, at which meeting it was voted to go into voluntary liquidation, and Thomas L. Kimball, was selected as the trustee in that behalf, and such voluntary liquidation was authorized by the Comptroller of the Currency. One of the notes so given to the Union National Bank was sold and transferred to complainant, Sumner Wallace, who has brought this action under the provisions of the Act of Congress of June 30, 1876, page 63, Vol. 19, Statutes at Large, Complied Statutes United States, Vol. 3, page 3509 to enforce the stockholders' liability.

The only questions I deem necessary to be considered at this time are: first, was the indebtedness of the Union National Bank evidenced by said notes such an indebtedness as the bank

was authorized to incur, or was said contract ultra vires and not within any of the authorized powers of the bank; and second, was such indebtedness, if authorized and not ultra vires, such an indebtedness that the stockholders are liable for.

In deciding the first question it is necessary to determine the nature and character of the indebtedness. While the contract referred to speaks of it as a guaranty upon the part of the American National Bank, yet its character is to be determined by the actual transaction. In regard to a contract in
189 this respect similar to the one under consideration the Court of Appeals of the Eighth Circuit, in Schofield v. State National Bank of Denver, 97 Fed. Rep. 282, Sanborn, C. J., writing for the Court, held that the transaction was, as to the Union National Bank a loaning of money. If then the transaction was a loan on the part of the Union National Bank to the American National Bank, it must have been a borrowing on the part of the American National, for whenever there is a loaning of money by one party there must be a borrowing by the other. I conclude, then, that the transaction was a lending of money by the Union National Bank to the American National Bank, and a borrowing of money by the American National from the Union National. Was such borrowing of money on the part of the American National ultra vires its charter powers? In Auten v. United States Bank of New York, 174 U. S. 125 and Aldrich v. Chemical National Bank 176 U. S. 618, it was held that the borrowing of money was not out of the usual course of banking business. In view of these pronouncements by the Supreme Court, I hold that the borrowing of money by the American National Bank from the Union National Bank was not ultra vires. It is insisted, however, that because the borrowing of money in the case was in contemplation of ceasing to do business, on the part of the American National Bank, and not in the usual business as a going concern, and from the further fact that the time of payment was extended over a period of three years, it was not such a borrowing as was authorized by the charter, and, hence the contract as evidenced by the notes in question was void.

The borrowing of the money was to pay the legitimate demands of the American National Bank to tide over an existing emergency, and with a view of enabling the bank to liquidate its affairs without loss. I am of the opinion that such a
190 borrowing was not beyond the powers of the bank, and that the promise to repay, as evidenced by the notes, was not an ultra vires obligation of the bank.

The second question, as to whether such obligation is one for which the stockholders are to be held individually liable,

is not free from doubt. In Shrader v. Manufacturers Bank, 133 U. S. 67, it was said by Justice Blatchford, rendering the opinion, that the debt or obligation for which the stockholders were liable, was such a debt or obligation as was incurred in the usual and ordinary course of banking. In that case, however, the indebtedness of the bank for which it was sought to hold the stockholders liable, was one incurred by the President after the bank had gone into liquidation, and it was held that the President possessed no power to bind the bank by a contract after it had gone into liquidation. The case of Shrader v. Manufacturers Bank was cited by Chief Justice Fuller in Ward v. Joslyn, 186 U. S. 142, and the same expressions used. That was a case in which it was sought to hold the stockholders liable upon a guaranty made by the Western Investment Loan & Trust Company, not upon an obligation negotiated by said Western Investment Loan & Trust Company, but a mere accommodation guaranty, and it was held that such accommodation guaranty was not within the charter powers of the Western Investment, Loan & Trust Company, and that the mere fact that a judgment had been obtained against the Investment Loan & Trust Company, or the fact that such Company might upon principles of estoppel be liable upon the guaranty, yet this did not prevent the stockholders from showing the true nature of the transaction, and that the obligation was one ultra vires the Loan & Trust Company. So that in these
191 cases the facts were, and the judgment of the court was, that under the facts the debt or obligation was not one which the corporation had authority to incur, and hence, being an ultra vires obligation, the stockholder was not liable. It is true, that from the expressions in the opinions it would appear that there might be obligations contracted upon the part of the bank which were not ultra vires the bank, but so far out of the usual and ordinary course of banking that the stockholders would not be individually liable therefor, notwithstanding the corporation would be liable upon such obligations.

The rule as stated by Judge Sanborn, in King, Receiver, of the First National Bank of Frankfort, Kansas, v. J. P. Pomeroy (decided by the Court of Appeals, March 9, 1903, and authorities cited) as follows: "The authority of general expressions and broad statements in the opinions of courts is always limited to the specific questions which they were considering and deciding when they were used", must be applied in considering the cases of Shrader v. Manufacturers Bank and Ward v. Joslyn, and as applied to those cases they are merely a holding that an indebtedness which the corporation was not authorized to incur is not an indebtedness in the usual course of business, and hence the stockholders are not liable therefor.

Having reached the conclusion in this case that the indebtedness evidenced by the notes, and which is the foundation of this action, was a borrowing of money by the American National Bank from the Union National Bank, and that such borrowing of money was within the authorized powers of the American [Natioanl] Bank, it follows that the indebtedness is one for which the stockholders may be held liable.

192 In the contract, however, between the American National Bank and the Union National Bank it was provided that the Union National Bank would liquidate the assets of the American National which it did not take and accept as cash, without charge or expense to the American National Bank, except such court charges and attorney's fees as might be found necessary, and that such liquidation should be conducted under the direction of Thomas L. Kimball, or such other person as might be agreed upon on behalf of the stockholders of the American National Bank. Under this provision it becomes necessary to consider some of the items of expense in liquidating such assets which under the evidence have been charged to the American National Bank. From such expenses the following items will be eliminated:

Readjusting two loans,	$ 50.52
Examining land, Boone County, Nebraska,	12.30
Cleaning and tuning pianos,	67.95
Collecting Holdrege bond coupons,	10.62
Exchange, express, etc.,	16.80
Fitting up vault case,	41.20
Robinson's chattels,	114.50
Traveling expenses,	96.16
Horse and buggy appraisals,	9.50
Telegrams,	7.93
Salaries,	6,514.39
Real Estate commission,	85.00
Abstracts of title,	106.20
Recording deeds,	29.55
Postage,	130.34

193 With these deductions, Counsel for complainant will compute the amount due upon said notes, submit the same to Counsel for the several answering respondents, and prepare the proper decree, providing for the amount of judgment against each of the respondents, and the same may be submitted to the court for signature on the 2nd day of May, at 10 o'clock A. M., when all the parties may be present and will be heard as to the correctness of the computations herein provided for, and as to the form of decree.

Indorsed: Filed Apr. 24, 1903. Geo. H. Thummel, Clerk.

194 Thereupon afterwards, to-wit: At the May 1903 Term of said Court, and on the 23rd day of May, 1903, the following Decree was signed and filed in said case, and entered of record on the Journal of proceedings of said court had on said day, to-wit:

Sumner Wallace, Complainant,

vs.

American National Bank, a corporation, The McCague Investment Company, a corporation, Thomas H. McCague, Alex. G. Charlton, Elmer C. Brownlee, Elizabeth Dufrene, Executrix of the last will and testament of Alfred R. Dufrene, deceased, Edgar M. Morsman, Philip Mergin, George G. Wallace, William S. Poppleton, John S. King, William Wallace, Charles F. Manderson, Anna C. Crowell, Charles C. George, George W. McClellan, Executor of the last will and testament of Robert H. McClellan, deceased, Peter Frenzer, John N. Frenzer, Charles H. Walworth, Frank W. Wessells, Frank Graham, James H. McCulloch, John P. Charlton, C. W. Morton, Royal Wilson, Jacob Wead, James J. Brown, Jr., James J. Woodward, Viola Coffin, Howard B. Smith, Edward G. Glenn, Emily J. Robinson, James H. Morton, George Morton, Mary E. Morton, William Wilson, Henry F. Wyman, Albert U. Wyman, F. R. McConnell, Trustee, John Speer, John E. Patrick, R. L. Brownlee, Caroline Carpenter, William C. Beer, Marcus C. Acheson, George Marples, Arthur H. Flack, Meade C. Williams, James H. Conrad, T. R. Neal, J. H. Hawkins, William Baird, The Manufacturers' National Bank of Boston, Mass., a corporation, John L. McCague, Morris Levy, National Bank Building Company of America, a corporation, John L. McCague and Thomas H. McCague, William L. McCague and Alex. H. Charlton partners doing business under the firm name and style of McCague Bros., Rufus B. Bullock, Thomas L. Kimball, Thomas L. Kimball, Trustee, Alex. G. Charlton, Secretary, Samuel Blackwell, and the Union National Bank of Omaha, Nebraska, Defendants.

This cause came on to be heard at the May, 1903 Term of this court upon the Amended Bill of complainant, Sumner Wallace, suing for himself and on behalf of all other creditors of the American National Bank, and the answer and claim of the Union National Bank, and the answers of the various respond-

ents and the replications filed thereto, and the arguments of counsel, and was submitted to and taken under advisement by the court.

195 And now on this 16th day of May, 1903, after full consideration of the pleadings, evidence and arguments of counsel the court finds, that the following named defendants were stockholders of the said American National Bank on or about the month of February 1895, and held the number of shares set opposite their respective names, as follows:

Thomas H. McCague	10	Shares
Alex. G. Charlton	9	"
Elmer C. Brownlee	10	"
Alfred R. Dufrene	75	"
Edgar M. Morsman	75	"
Philip Mergin	7½	"
George G. Wallace	75	"
William S. Poppleton	56¼	"
John S. King	2	"
William Wallace	20	"
Charles F. Manderson	10	"
Anna C. Crowell	9 3-4	"
Chas. C. George	15	"
Robert H. McClellan	50	"
Peter Frenzer	15	"
John N. Frenzer	5	"
Charles H. Walworth	22½	"
Frank W. Wessels	3 3-4	"
Frank Graham	3 3-4	"
James H. McCulloch	25	"
John P. Charlton	7½	"
C. W. Morton	6	"
Royal Wilson	10	"
Jacob Wead	7½	"
James J. Brown, Jr.	5	"
James J. Woodward	2½	"
Viola Coffin	7½	"
Howard B. Smith	50	"
Edward G. Glenn	5	"
Emily J. Robinson	1½	"
James H. Morton	2	"
George Morton	1	"
Mary E. Morton	1	"
William Wilson	11¼	"
Henry F. Wyman	58½	"
A. U. Wyman	10	"
F. R. McConnell, Trustee,	5	"

	John Speer	10	"
	John E. Patrick	15	"
	R. L. Brownlee	25	"
	Miss Caroline Carpenter	18	"
	W. S. Beer	6	"
	Marcus C. Acheson	15	"
	George Marples	15	"
	Arthur H. Flack	5	"
	Meade C. Williams	11¼	"
	James H. Conrad	10	"
	T. R. Neal	10	"
	J. H. Hawkins	25	"
196	William Baird	10	Shares
	The Manufacturers' National Bank,	25	"
	John L. McCague	287	"
	Morris Levy	50	"
	National Bank Bldg. Co. of America	615	"
	McCague Bros.	50	"
	Rufus B. Bullock	22½	"
	Thomas L. Kimball	20	"
	Alex. G. Charlton, Secretary	20	"
	Samuel Blackwell	50	"

That the stock standing in the name of Alex G. Charlton, Secretary, belonged to and was the property of the McCague Investment Company, defendant herein.

That the amount of the capital stock of said American National Bank is the sum of Two Hundred Thousand dollars ($200,000.00), divided into two thousand (2,000) shares of one hundred dollars ($100.00) each.

That all of the assets of said American National Bank have been exhausted.

That the amount of the indebtedness of said American National Bank remaining after all of the assets were exhausted and applied upon the indebtedness of said American National Bank is the sum of $194,466.35-100.

That the amount due the said complainant, Sumner Wallace, from said American National Bank and the stockholders thereof, upon the note assigned to him by the Union National Bank is the sum of $46524.83-100.

That there is due from the American National Bank and the said stockholders thereof to the Union National Bank upon the two promissory notes held by it the sum of $147941.52-100.

That the amount due upon each share of stock, and for which each stockholder is liable upon each share held by him is the sum of $97.23-100.

197 That each defendant stockholder of the said American National Bank is liable [retably] according to the shares held by each, to said Sumner Wallace and the said Union National Bank as follows:

That of said amount there is due

From the American National Bank to the complainant, Sumner Wallace, the sum of	$46524.83	
From the American National Bank to the said Union National Bank, the sum of		$147941.52
From the McCague Investment Company to the complainant, Sumner Wallace, the sum of	$ 465.20	
From the McCague Investment Company to the said Union National Bank the sum of		$ 1479.40
From Thomas H. McCague to the complainant Sumner Wallace, the sum of	$ 232.60	
From Thomas H. McCague to the said Union National Bank, the sum of		$ 739.70
From Alex. G. Charlton to the complainant, Sumner Wallace, the sum of	$ 209.34	
From Alex. G. Charlton to the said Union National Bank, the sum of		$ 665.73
From Elmer C. Brownlee, to the [complainant] Sumner Wallace, the sum of	$ 232.60	
From Elmer C. Brownlee, to the said Union National Bank the sum of		$ 739.70
From Elizabeth Dufrene, Executrix of the last will and testament of Alfred R. Dufrene to the complainant, Sumner Wallace, the sum of	$ 1744.50	
From Elizabeth R. Rufrene, Executrix of the last will and testament of Alfred R. Dufrene to the said Union National Bank, the sum of		$ 5547.75
From Edgar M. Moreman, to the complainant, Sumner Wallace, the sum of	$ 1744.50	
From Edgar M. Moreman to the said Union National Bank the sum of		$ 5547.75
From Philip Mergin, to the complainant, Sumner Wallace, the sum of	$ 174.45	
From Philip Mergin, to the said Union National Bank.. the sum of		$ 554.77
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From George G. Wallace to the complainant Sumner Wallace, the sum of	$ 1744.50	
From George G. Wallace to the said Union National Bank the sum of		$ 5547.75
From William S. Poppleton to the complainant, Sumner Wallace, the sum of	$ 1308.37	
From William S. Poppleton to the said Union National Bank the sum of		$ 4160.81
From John S. King to the complainant, Sumner Wallace, the sum of	$ 46.52	
From John S. King to the said Union National Bank the sum of		$ 147.94
From Charles F. Manderson to the complainant Sumner Wallace, the sum of	$ 232.60	
From Charles F. Manderson to the said Union National Bank the sum of		$ 739.70
From Anna C. Crowell to the complainant, Sumner Wallace the sum of	$ 226.77	

From Anna C. Crowell to the said Union National Bank the sum of		$ 721.20
From Charles C. George to the complainant, Sumner Wallace the sum of	$ 348.90	
From Charles C. George to the said Union National Bank the sum of		$ 1169.55
From George W. McClellan, Executor of the last will and testament of Robert H. McClellan, to the [complainant], Sumner Wallace the sum of	1163.60	
From George W. McClellan, Executor of the last will and testament of Robert H. McClellan, to the said Union National Bank the sum of		$ 3698.50
From Peter Frenzer to the complainant, Sumner Wallace, the sum of	$ 348.90	
From Peter Frenzer to the said Union National Bank the sum of		$ 1169.5.
From John N. Frenzer to the complainant, Sumner Wallace, the sum of	$ 116.30	
From John N. Frenzer to the said Union National Bank the sum of		$ 369.85
From Charles H. Walworth, to the complainant, Sumner Wallace, the sum of	$ 523.35	
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From Charles H. Walworth to the said Union National Bank the sum of		$ 1664.22
From Frank W. Wessells to the complainant Sumner Wallace, the sum of	$ 87.21	
From Frank W. Wessells to the said Union National Bank the sum of		$ 277.38
From Frank Graham to the complainant, Sumner Wallace, the sum of	$ 87.21	
From Frank Graham to the said Union National Bank the sum of		$ 277.38
From James H. McCulloch to the complainant, Sumner Wallace, the sum of	$ 581.50	
From James H. McCulloch to the said Union National Bank the sum of		$ 1849.35
From Charles W. Morton to the complainant, Sumner Wallace, the sum of	$ 138.56	
From Charles W. Morton, to the said Union National Bank the sum of		$ 443.82
From James J. Woodward to the complainant, Sumner Wallace the sum of	$ 58.15	
From James J. Woodward to the said Union National Bank the sum of		$ 184.92
From Viola Coffin to the complainant Sumner Wallace, the sum of	$ 174.45	
From Viola Coffin to the said Union National Bank the sum of		$ 554.77
From Howard B. Smith, to the complainant Sumner Wallace, the sum of	$ 1163.60	
From Howard B. Smith to the said Union National Bank the sum of		$ 3698.50
From Emily J. Robinson to the complainant, Sumner Wallace the sum of	$ 34.89	
From Emily J. Robinson to the said Union National Bank, the sum of		$ 110.95
From James H. Morton to the complainant, Sumner Wallace, the sum of	$ 46.52	
From James H. Morton to the said Union National Bank the sum of		$ 147.94
From George Morton to the complainant, Sumner Wallace the sum of	$ 23.26	

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From George Morton to the said Union National Bank the sum of		$ 73.97
From Mary E. Morton to the complainant, Sumner Wallace the sum of	$ 23.26	
From Mary E. Morton to the said Union National Bank the sum of		$ 73.97
From Henry F. Wyman to the complainant Sumner Wallace, the sum of	$ 1354.89	
From Henry F. Wyman, to the said Union National Bank the sum of		$ 4308.75
From Albert U. Wyman to the complainant, Sumner Wallace the sum of	$ 232.60	
From Albert U. Wyman to the said Union National Bank, the sum of		$ 739.70
From F. R. McConnell, Trustee, to the complainant, Sumner Wallace, the sum of	$ 116.30	
From F. R. McConnell, Trustee, to the said Union National Bank the sum of		$ 369.85
From John Speer to the complainant, Sumner Wallace, the sum of	$ 232.60	
From John Speer to the said Union National Bank the sum of		$ 739.70
From John E. Patrick to the complainant, Sumner Wallace, the sum of	$ 348.90	
From John E. Patrick, to the said Union National Bank the sum of		$ 1109.55
From R. L. Brownlee to the complainant, Sumner Wallace, the sum of	$ 581.50	
From R. L. Brownlee to the said Union National Bank the sum of		$ 1849.25
From Caroline Carpenter to the complainant, Sumner Wallace, the sum of	$ 418.68	
From Caroline Carpenter to the said Union National Bank the sum of		$ 1331.46
From William C. Beer to the complainant, Sumner Wallace, the sum of	$ 139.56	
From William C. Beer to the said Union National Bank the sum of		$ 443.82
From George Marples to the complainant, Sumner Wallace, the sum of	$ 348.90	

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From George Marples to the said Union National Bank the sum of		$ 1109.55
From James H. Conrad to the complainant, Sumner, Wallace, the sum of	$ 232.60	
From James H. Conrad to the said Union National Bank, the sum of		$ 739.70
From T. R. Neal to the complainant, Sumner Wallace, the sum of	$ 232.60	
From T. R. Neal to the said Union Natonal Bank the sum of		$ 739.70
From J. H. Hawkins, to the complainant, Sumner Wallace, the sum of	$ 581.50	
From J. H. Hawkins to the said Union National Bank the sum of		$ 1849.25
From William Baird to the complainant, Sumner Wallace, the sum of	$ 232.60	
From William Baird to the said Union National Bank the sum of		$ 739.70

From John L. McCague to the complainant, Sumner Wallace, the sum of	$ 6675.62	
From John L. McCague to the said Union National Bank, the sum of		$ 21229.39
From Morris Levy to the complainant, Sumner Wallace the sum of	$ 1163.00	
From Morris Levy to the said Union National Bank the sum of		$ 3698.50
From National Bank Building Company of America, to the complainant, Sumner Wallace, the sum of	$14304.90	
From National Bank Building Company of America to the said Union National Bank the sum of		$ 45491.55
From John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners doing business under the firm name and style of McCague Bros., to the complainant, Sumner Wallace, the sum of	$ 1163.00	
From John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners doing business under the firm name and style of McCague Bros., to the said Union National Bank the sum of		$ 3698.50
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From Rufus B. Bullock to the complainant, Sumner Wallace, the sum of	$ 523.35	
From Rufus B. Bullock, to the said Union National Bank the sum of		$ 1664.32

The court further finds that the following named stockholders have not been served personally within this state, but beyond this circuit, and have not appeared herein, but are liable ratably according to the shares held by each to said Sumner Wallace and the Union National Bank as follows:

From William Wallace to the complainant Sumner Wallace, the sum of	$ 462.20	
From William Wallace to the said Union National Bank the sum of		$ 1479.40
From John P. Charlton to the complainant, Sumner Wallace the sum of	$ 174.45	
From John P. Charlton to the said Union National Bank the sum of		$ 554.77
From Jacob Wead to the complainant, Sumner Wallace, the sum of	$ 174.45	
From Jacob Wead to the said Union National Bank the sum of		$ 554.77
From Edward G. Glenn to the complainant Sumner Wallace, the sum of	$ 116.30	
From Edward G. Glenn to the said Union National Bank the sum of		$ 369.85
From William Wilson to the complainant, Sumner Wallace, the sum of	$ 261.67	
From William Wilson to the said Union National Bank the sum of		$ 832.16
From Arthur H. Flack to the complainant, Sumner Wallace, the sum of	$ 116.30	
From Arthur H. Flack, to the said Union National Bank the sum of		$ 369.85
From Meade C. Williams, to the complainant, Sumner Wallace the sum of	$ 261.67	

From Meade C. Williams to the said Union National Bank, the sum of		$ 832.16
From Manufacturers' National Bank to the complainant, Sumner Wallace the sum of	$ 581.50	
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From Manufacturers' National Bank to the said Union National Bank the sum of		$ 1849.25
From Samuel Blackwell to the complainant, Sumner Wallace, the sum of	$ 1163.00	
From Samuel Blackwell to the said Union National Bank the sum of		$ 3698.50
From Marcus C. Acheson to the complainant, Sumner Wallace the sum of	$ 348.90	
From Marcus C. Acheson to the said Union National Bank the sum of		$ 1109.55

Wherefore it is ordered, adjuded and decreed by the court that the complainant Sumner Wallace, have and recover of each of the said defendant stockholders as follows, to-wit:

From the American National Bank the sum of	$ 46524.83
From the McCague Investment Co. the sum of	$ 465.20
From Thomas H. McCague the sum of	$ 232.60
From Alex G. Charlton the sum of	$ 209.34
From Elmer C. Brownlee the sum of	$ 232.60
From Elizabeth Dufrene, [Executrix] of the last will and testament of Alfred R. Dufrene deceased, the sum of	$ 1744.50
From Edgar M. Morsman the sum of	$ 1744.50
From Philip Mergin, the sum of	$ 174.45
From George G. Wallace the sum of	$ 1744.50
From William S. Poppleton the sum of	$ 1308.37
From John S. King the sum of	$ 46.52
From Charles F. Manderson the sum of	$ 232.60
From Anna C. Crowell, the sum of	$ 226.77
From Charles C. George the sum of	$ 348.90
From George W. McClellan, Executor of the last will and testament of Robert H. McClellan deceased, the sum of	$ 1163.00
From Peter Frenzer the sum of	$ 348.90
From John N. Frenzer the sum of	$ 116.30
From Charles H. Walworth the sum of	$ 523.35
From Frank W. Wessells the sum of	$ 87.21
From Frank Graham the sum of	$ 87.21
From James H. McCulloch, the sum of	$ 581.50
From Charles W. Morton the sum of	$ 139.56
From James J. Woodward the sum of	$ 58.15
From Viola Coffin the sum of	$ 174.45
From Howard B. Smith the sum of	$ 1163.00
From Emily J. Robinson the sum of	$ 34.89
From James H. Morton the sum of	$ 46.52
From George Morton the sum of	$ 23.26
From Mary E. Morton the sum of	$ 23.26
From Henry F. Wyman the sum of	$ 1354.89
From Albert U. Wyman the sum of	$ 232.60
From F. R. McConnell, Trustee, the sum of	$ 116.30
From John Speer the sum of	$ 232.60
From John E. Patrick the sum of	$ 348.90
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From R. L. Brownlee the sum of	$ 581.50
From Caroline Carpenter the sum of	$ 418.68
From William C. Beer the sum of	$ 139.56
From George Marples the sum of	$ 348.90

From James H. Conrad the sum of	$ 232.60
From T. R. Neal the sum of	$ 232.60
From J. H. Hawkins the sum of	$ 581.50
From William Baird the sum of	$ 232.60
From John L. McCague the sum of	$ 6675.62
From Morris Levy the sum of	$ 1163.00
From National Bank Building Company of America the sum of	$ 14304.90
From John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners doing business under the firm name and style of McCague Bros., the sum of	$ 1163.00
From Rufus B. Bullock the sum of	$ 523.35

And it is further ordered, adjudged and decreed by the Court that the Union National Bank have and recover of each of said defendant stockholders as follows, to-wit:

From the American National Bank the sum of	$147941.52
From the McCague Investment Co., the sum of	$ 1479.40
From Thomas H. McCague the sum of	$ 739.70
From Alex. G. Charlton the sum of	$ 665.73
From Elmer C. Brownlee the sum of	$ 739.70
From Elizabeth Dufrene, Executrix of the last will and testament of Alfred R. Dufrene, deceased the sum of	$ 5547.75
From Edgar M. Morsman the sum of	$ 5547.75
From Philip Mergin the sum of	$ 554.77
From George G. Wallace the sum of	$ 5547.75
From William S. Poppleton the sum of	$ 4160 81
From John S. King the sum of	$ 147.94
From Charles F. Manderson the sum of	$ 739.70
From Anna C. Crowell the sum of	$ 721.20
From Charles C. George the sum of	$ 1109.55
From George W. McClellan, Executor of the last will and testament of Robert H. McClellan, deceased, the sum of	$ 3698.50
From Peter Frenzer the sum of	$ 1109.55
From John N. Frenzer the sum of	$ 369.85
From Charles H. Walworth the sum of	$ 1664.32
From Frank W. Wessells the sum of	$ 277.38
From Frank Graham the sum of	$ 277.38
From James H. McCulloch the sum of	$ 1849.25
From Charles W. Morton the sum of	$ 443.82
From James J. Woodward the sum of	$ 184.92
From Viola Coffin the sum of	$ 554.77
From Howard B. Smith the sum of	$ 3698.50
From Emily J. Robinson the sum of	$ 110.95
From James H. Morton the sum of	$ 147.94
From George Morton the sum of	$ 73.97
From Mary E. Morton the sum of	$ 73.97
From Henry F. Wyman the sum of	$ 4308.75
From Albert U. Wyman the sum of	$ 739.70
From F. R. McConnell, Trustee the sum of	$ 369.85
[205]	
From John Speer the sum of	$ 739.70
From John E. Patrick the sum of	$ 1109.55
From R. L. Brownlee the sum of	$ 1849.25
From Caroline Carpenter the sum of	$ 1331.46
From William C. Beer the sum of	$ 443.82
From George Marples the sum of	$ 1109.55
From James H. Conrad the sum of	$ 739.70
From T. R. Neal the sum of	$ 739.70
From J. H. Hawkins the sum of	$ 1849.25
From William Baird the sum of	$ 739.70

From John L. McCague the sum of	$ 21229.39
From Morris Levy the sum of	$ 3698.50
From National Bank Building Company of America the sum of	$ 45491.55
From John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners doing business under the firm name and style of McCague Bros., the sum of	$ 3698.50
From Rufus B. Bullock the sum of	$ 1664.32

Each of said judgments to bear interest at the rate of 6% per annum from May 1st 1903.

It is further ordered, adjudged and decreed by the court, that the defendants against whom the said Sumner Wallace and the Union National Bank are given judgment herein shall pro rata pay the costs of this case, except cost of serving non-resident defendants, taxed at $ and that execution be issued against each of said defendants.

It is further ordered, adjudged and decreed by the court that Gurdon W. Wattles, is hereby appointed Receiver for and authorized to commence suit for and on behalf of Sumner Wallace and the Union National Bank within the proper jurisdiction against the defendant stockholders herein who were not served with summons within this state, and against whom judgment has not been rendered in this case, upon their liability as stockholders of said American National Bank, as found in this decree, and that he make report of his doings from time to time to the court.

And Edgar M. Morsman, one of the defendants, having prayed an appeal and filed an assignment of errors, it is

Ordered that his appeal be and the same hereby is
206 allowed with supersedeas, upon the giving of security to be approved by a Judge of the Court.

And William S. Poppleton, one of the defendants, having prayed an appeal and filed an assignment of errors, it is

Ordered that his appeal be and the same is hereby allowed with supersedeas, upon giving of security to be approved by a Judge of the court.

And each and all of the other defendants against whom judgments are rendered herein, having severally in open court prayed an appeal, it is

Ordered that an appeal be and the same is hereby allowed with supersedeas, upon giving a bond to be approved by a Judge of the Court, or if supersedeas is not desired a cost bond is hereby fixed at two hundred dollars.

By the Court

W. H. MUNGER, Judge.

Dated May 23 1903.

Indorsed: Filed May 23 1903. Geo. H. Thummel, Clerk.

207 Thereupon afterwards, to-wit: On the 30th day of December, 1901, Depositions of William Baird, Charles E. Ford, Henry F. Wyman, James Burness, G. W. Wattles, John L. McCague, J. W. Thomas and H. E. Rainey were filed in said case, which said Depositions are in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

Sumner Wallace, Complainant,
vs.
American National Bank, et al., Respondents.

Notice to Take Depositions.

The above named respondents will take notice that on the 29th day of October, 1901, the said complainant will take the depositions of William Baird, Charles E. Ford, Henry F. Wyman, James Burness, G. W. Wattles, John L. McCague, J. W. Thomas and H. E. Rainey, to be used as evidence on the trial of the above entitled cause, before G. S. Waring, Notary Public, at Court Room No. 2 in the United States Court House and Post Office Building, in the City of Omaha, in the County of Douglas, and State of Nebraska, at the hour of 10 o'clock A. M., with authority to adjourn from day to day until such depositions shall have been taken.

HALL & McCULLOCH,
JAMES H. MACOMBER,
Dated October 22, 1901. Solicitors for complainant.

Service of the annexed notice is hereby accepted this 22nd day of October, 1901.

DEXTER L. THOMAS,
Solicitor for Alfred R. Dufrene, and Elizabeth Dufrene, Executrix.

208 Service of the annexed notice is hereby accepted this 22nd day of October, 1901.

W. H. DeFRANCE,
Solicitor for C. W. Morton, Jas. H. Morton, Mary C. Morton, Geo. Morton.

Service of the annexed notice is hereby accepted this 22nd day of October, 1901.

CHAS. BATTELLE,
Solicitor for Caroline Carpenter, McCague Investment Co., John L. McCague, Thos. H. McCague, Wm. L. McCague, Alex. G. Charlton, Anna C. Crowell, Royal C. Wilson, Emily J. Robinson, Geo. Marples, McCague Bros., Alex G. Charlton, Sec'y, Union National Bank, Rufus B. Bullock, Robt. H. McClennan, John Spear, R. L. Brownlee, J. H. Hawkins,

Service of the annexed notice is hereby accepted this 22nd day of October, 1901.

GUY R. C. READ,
Solicitor for Francis W. Wessells.

Service of the annexed notice is hereby accepted this 22nd day of October, 1901.

JAMES E. KELBY,
Solicitor for Chas. F. Manderson.

Service of the annexed notice is hereby accepted this 22nd day of October, 1901.

HUGH A. MYERS,
Solicitor for T. R. Neal.

Service of the annexed notice is hereby accepted this 22nd day of October, 1901.

PAUL CHARLTON,
Solicitor for Frank Graham.

Service of the annexed notice is hereby accepted this 22nd day of October, 1901.

JOHN D. WARE,
Solicitor for Chas. H. Walworth.

Service of the annexed notice is hereby accepted this 22nd day of October, 1901.

ROBT. W. PATRICK,
Solicitor for John E. Patrick.

209 Service of the annexed notice is hereby accepted this 22nd day of October, 1901.

WM. BAIRD per se

Service of the annexed notice is hereby accepted this 22nd day of October, 1901.

EDGAR M. MORSMAN, Jr.,
Solicitor for Edgar Morsman.

Service of the annexed notice is hereby accepted this 22nd day of October, 1901.

W. S. POPPLETON,
Solicitor for Wm. S. Poppleton.

Service of the annexed notice is hereby accepted this 22nd day of October, 1901.

S. R. RUSH,
Solicitor for Viola Coffin.

Service of the annexed notice is hereby accepted this 22nd day of October, 1901.

HOWARD B. SMITH,
Solicitor for Elmer C. Brownlee, Peter Frenzer, Jno. N. Frenzer, Howard B. Smith, Henry F. Wyman, A. U. Wyman, Chas. C. George.

United States of America,
State and District of Nebraska,
County of Douglas—ss.

I, G. S. Waring, being first duly sworn, on oath say, that on the 22nd day of October, 1901, I served the annexed notice upon L. F. Crofoot, Solicitor for J. I. Woodward, J. C. Cowin, Solicitor for T. R. Neal, Frank Graham and J. I. Woodward, and J. C. Kinsler, by leaving with said L. F. Crofoot, J. C. Cowin and J. C. Kinsler, a true and correct copy of said notice.

G. S. WARING.

210 Subscribed and sworn to before me this 27th day of October, 1901.

[Seal] JOHN NICHOLSON,
Deputy Clerk U. S. Circuit Court.

United States for the District of Nebraska.

Sumner Wallace, Complainant,
No. 261 T. vs.
American National Bank et al., Respondents.

Depositions of William Baird, H. F. Wyman, H. E. Rainey, James Burness and G. W. Wattles, taken before me, G. S. Waring, a Notary Public within and for the County of Douglas, in the State of Nebraska, on the 29th day of October, in the year 1901, at the hour of 10 o'clock A. M., of said day, and the days thereafter as shown herein at Omaha, in said County, in an action pending in the United States Circuit Court for the District of Nebraska, wherein Sumner Wallace is complainant and the American National Bank, et al., are respondents; J. H. Macomber and J. H. McCulloch being present and ap-

pearing for the complainant, and Howard B. Smith, W. W. Morsman, John D. Ware, Chas. Battelle, Paul Charlton and W. H. Defrance being present and appearing for the respondents respectively as set out in the acceptances and affidavits of service of the Notice to take Depositions hereto attached and made a part hereof.

211 William Baird, of lawful age, being by me duly examined, cautioned and solemnly sworn as hereinafter certified, deposeth and sayeth as follows, viz:

Direct Examination

By Mr. Macomber:

Q. You may state your name, age and residence?

A. My name is William Baird; age 53; residence Omaha, Nebraska.

Q. How long have you live in Omaha, Mr. Baird?

A. Fourteen years about.

Q. You may state if you were a director of the American National Bank on the 21st of December, 1895? A. I was.

Q. Do you remember the fact of the contract between the American National Bank and the Union National Bank?

A. I do, yes sir.

Q. How long had you been a director of the American National Bank prior to the 21st day of December, 1895?

A. I think about two years. I became a director, if I remember right, in the early Fall of 1893, early part of the Fall of 1893, and that contract was made I think in the latter part of the Fall, early part of the winter of 1895.

Q. You may state if you took part as a director in the transaction? A. I did.

Q. What committee, if any, of the Board of Directors of the American National Bank did you belong to?

A. I belonged to what I think was designated the Executive Committee of the Board; I believe that was the name consisting of myself, Mr. Levy and Mr. Dufrene, if I re-

212 member right.

Q. What were the particular duties of that committee,

A. The duties of that committee were to inspect the loans and investments which were being made of the funds of the American National Bank from the time of the organization of our Board of Directors and to take general supervision of the business of the bank, as I now remember them.

Q. You may state if you knew the daily transactions of the Bank, as a director and member of this committee?

A. In a general way I did; we met once a week on Saturday, I think, and reviewed the work of the week; that was our custom.

Q. You may state whether or not you knew of the financial condition of the American National Bank on the 21st and a few days or weeks prior, in 1895, as to its ability to meet its coming obligations? A. I did, yes sir.

Q. You may state what condition that was?

It is agreed that all of the objectons made by the defendants are made by each defendant.

The defendants object to the question on the ground that it calls for a conclusion or opinion of the witness.

A. Well, in a general way I would state it was not a very healthy condition, financially speaking.

Q. You may state in a general way if you know, what the obligations were immediately to be met by the American National Bank on or about the 21st day of December, 1895?

A. The deposits of the American National Bank—

Mr. Smith:

Q. Your information came did it not, Mr. Baird, from the examination of reports made to you by the officers of
213 the Bank? A. Yes sir, that is all I knew.

Q. And those reports are a part of the records of the bank, are they not? A. Well, I presume so.

Each of the defendants object to the evidence on the ground that it is not the best evidence.

A. Mr. Baird, I would like to add there, however, that my knowledge of the affairs consisted of the reports which the officers made and the investigation which I made as a member of the Executive Committee of the Board at the time as to the truth of those.

Mr. Macomber: Q. You may go ahead and finish your answer.

A. Answering further the above question, the deposits in the Fall of 1895, shortly prior to the time of the agreement which we have spoken of, consisted in part of accounts held by the City Treasurer, the County Treasurer of Douglas County, and the State Treasurer; as I now remember those accounts were quite large, though at present I am not able to state exactly the amount of any one of them.

Q. Now, you may state if, as a member of the Board of Directors of the American National Bank you had consultations with the other members as to meeting these obligations?

A. I did.

Q. About how many times during the space of a week preceding the 21st of December, did you consult together?

A. Well, I don't remember now; we had various conversations and discussions in reference to it; I don't remember the number of times.

Q. You may state if the directors of the American
214 National Bank arrived at any conclusion as to the necessity for money at that time?

Each of the defendants object to the question as not the best evidence.

A. Yes sir; they did.

Q. Well, you may state what determination the officials and the directors arrived at as to the necessity of borrowing money, in a general way?

Each of the defendants object to the question as not the best evidence, as being vague, uncertain and indefinite.

Q. I don't mean to call for any entry of a record particularly.

Each of the defendants object as not the best evidence, vague, uncertain and indefinite.

A. The officers of the bank and the Board concluded that it would be necessary to make some arrangement to meet the demands that had been made or of which we had received notice would be made on the deposit account by the city and county treasurers, and I think, also the state treasurer.

Q. You may state about how long, the number of days these negotiations leading up to this contract with the Union National Bank occupied?

A. The fact is these negotiations were not conducted by the Board of Directors of the American National Bank, personally directly.

Q. Who was that done by?

A. They were conducted by Mr. William Minot, of Boston, who represented the National Bank Building Company
215 which was the largest stockholder of the American National Bank.

Q. And who else?

A. Myself as his attorney, and the officers of the Union National Bank.

Q. Who was the President of the American National Bank at that time? A. Mr. Kimball.

Q. And who was Cashier?

A. Mr. Wyman, Henry F. Wyman. I should add there that Mr. Kimball was also consulted as President of the Bank, in regard to the negotiations.

Q. You may state, in these consultations, as a director with the other directors and the President and the officials of the Bank, what conclusion you arrived at as to the ability to raise money from the assets of the Bank to meet these [excepted] obligations?

A. Well, we concluded that we could not raise the money, that we could not meet the obligations from the ordinary deposit accounts, that if we did not make some different arrangements from that which then existed we would be compelled to borrow money or liquidate the banks, one or the other.

Q. You may state what conclusion the directors arrived at as to the ability to raise sufficient money from the assets to safely continue the bank?

Each of the respondents object on the ground that it is not the best evidence.

A. The directors, after the two years' experience which we had had in handling the assets of the bank which came down to us from the previous board, had become acquainted with the fact that the securities behind those assets consisted largely of real estate securities, and we had been unable and became convinced that we could not realize on the as-
216 sets which we had in hand without time, and on account of the condition the real estate market was in at that time we did not regard it wise to undertake to force them on the market.

Q. You may state what the fact is as to whether the Board of Directors of the American National Bank got together upon the consideration of this preliminary matter that you have stated that Mr. Minot and yourself and Mr. Kimball participated in about borrowing money for making this contract?

A. I don't remember of any meeting of the board with reference to the question of borrowing money to meet the deposits.

Q. I have reference to the making of the contract?

A. The negotiations leading up to the making of the contract were conducted by Mr. Minot and myself, assisting him as his attorney at the time, and the officers of the Union National Bank, and as soon as we came to a verbal understanding as to the terms of the contract which was then proposed, the president of the American National Bank called a meeting of the Board of Directors of the bank and the whole matter was submitted to the board.

Q. Mr. Baird, I will hand you the contract, marked Exhibit "1" by the reporter, and will ask you first, if that is the contract referred to as having been made? A. It is.

Q. Were you present when that was executed? A. I was.

Q. Did you see it signed? A. I did.

Q. I will ask you regarding the signature there, "The American National Bank of Omaha, by Thomas L. Kimball, President," you may state whose signature that it, who wrote that?

A. Thomas L. Kimball, the President of the American National Bank.

217 Q. And the signature, "Union National Bank, by William W. Marsh, President", you may state whose signature that is, if you know?

A. The signature of William W. Marsh, President of the Union National Bank, signed in my presence.

Q. I will call your attention to the "Attest, Henry F. Wyman, Cas.?" and ask you whose signature that is?

A. The signature of Henry F. Wyman, Cashier of the American National Bank at that time.

Q. And "Attest, Charles E. Ford, Cashier", I will ask you whose signature that is?

A. The signature of Charles E. Ford, who was Cashier of the Union National Bank at that time.

Q. You say you saw the contract executed? A. I did.

Q. Do you know what was done under this contract immediately after its execution, if anything?

A. Yes; I know in a general way what was done.

Q. Well, were you present to know what change took place? A. Yes sir.

Q. You may state the facts about the carrying out of this contract so far as it went, I mean within your personal knowledge?

Each of the defendants object as incompetent, irrelevant, immaterial and not the best evidence, and calling for the conclusion of the witness.

A. The contract was executed by the officers of the two banks about eight o'clock in the evening of the day of its date, and the next morning the Union National Bank, by its officers, took possession of the offices and business of the Ameri-
218 can National Bank and assumed the deposits and paid the deposit accounts of the American National Bank as checks were presented on the same.

The defendant and each of them move to strike out the answer as not responsive.

Mr. Smith: Q. You knew, did you?

A. I presented my own check and had it paid.

Mr. Macomber: Q. You may state whether or not as one of the directors, you took notice of what was being done?

A. I certainly did. And I will add too, that the Union National Bank further proceeded in a general way to carry out the terms of that agreement.

Each of the defendants move to strike out that as a conclusion.

Q. Mr. Baird, I will call your attention to three promissory notes, dated December 23, 1895, for the face amount of $67,000 each, which the reporter has marked Exhibits "2", "3" and "4" and I will ask you to examine those notes and state if you know the fact of their execution? A. I do.

Q. You may state if you were present when they were made? A. I was.

Q. You may examine the signature of these notes which purports to be "The American National Bank by Thomas L. Kimball, President", attested by Henry F. Wyman, Cashier, and state whose genuine signatures they are?

A. The signature of Thomas L. Kimball is the signature of Thomas L. Kimball, President of the American National Bank at that time, and the signature of Henry F. Wyman is the signature of Henry F. Wyman, who was Cashier of the American National Bank at that time.

Q. You may state if you know, Mr. Baird, person-
219 ally what relation these notes bear to this contract which is Exhibit "1"?

A. Yes I do; the relation they sustain to the contract.

Q. Now, you may state why those notes were made by the American National Bank?

A. They were made for the purpose of performing the American National Bank's part of the contract which has already been mentioned, to that extent.

Q. I am calling now, for what you know personally, if you do, what was done as to arriving at the amount for which they should be made?

A. At my request statements were furnished us by the officers of the several banks showing the condition of the accounts and the details with reference to the carrying out of the provisions of this agreement and the balance which was necessary for the American National to provide security for to the Union National consisted of the sum that is embodied in these three notes.

Each of the defendants object to the answer as not responsive and move that it be stricken out.

Q. You may state whether there was any additional amount found to be due the Union National Bank besides these, if you recollect personally, that is, whether there was any Cashier's check or anything of that kind given by Mr. Wyman?

The defendants and each of them object to that as not the best evidence.

A. I can say in a general way that I know there was such but I do not remember, or did not have anything personally to do with it.

Q. Mr. Baird, do you know, or to be more specific,
220 I will call your attention to the provision of this contract making Mr. Kimball a trustee, and ask you who took possession of the assets mentioned in that contract?

Each of the defendants object as calling for the conclusion of the witness.

A. Mr. Kimball took possession of them as trustee under this agreement.

Q. Mr. Baird, my associates have called my attention that perhaps the identification of this signature was not sufficient, I will ask you whose signature—the genuine signature of the American National Bank by Thomas L. Kimball, President, and you may state whose it is, to those notes?

A. It is the signature of Thomas L. Kimball, who signed the name, The American National Bank, by Thomas L. Kimball, the President of that bank.

Q. Mr. Baird, you may state if you were present at a stockholder's meeting of the stockholders of the American National Bank soon after this contract was made?

A. Yes sir, I was.

Q. You may state [was] as to this contract being talked over and discussed in the stockholder's meeting?

Each of the defendants object as not the best evidence.

A. The contract was discussed at that meeting.

Q. You may state as near as you remember what information was furnished by the officers of the bank as to its condition at the time the contract was made, as to the necessity of borrowing money.

Each of the defendants object as incompetent and too general.

221 A. The officers, Mr. Kimball and Mr. Wyman, were both present at that stockholder's meeting, and several of the stockholders, amongst whom, as I now remember, were specially Senator Manderson, inquired of the President and Cashier and directors of the bank who were present why that contract was made and called for a full explanation of the whole situation. Mr. Kimball, in answer to these inquiries gave a full statement of the facts and conditions which controlled the Board of the American National Bank in coming

to the conclusion which it did reach in reference to the contract.

Q. Did he state this orally or in writing?

A. He stated it orally.

Q. You may state what he said?

A. As near as I [and] remember, I cannot now remember the language, I can state the substance of what he said was, that the American National Bank was confronted with notice from the city and county treasurers, and I think the state treasurer, to the effect that by the first of the year or before that time the deposits which were held by those different treasurers would be required and in consequence of that fact the withdrawal of those large deposits would reduce the amount of cash on hand below the lawful requirements, and that the officers and directors of the bank were unable to convert the assets of the bank without a great sacrifice and for that reason they were induced to enter into the contract which was made. Mr. Kimball entered quite fully into details at the time as to the facts and conditions.

Cross-Examination

By Mr. Morsman:

Q. Mr. Baird, you have stated in your examination in chief that the three notes which you have identified, for $67,000 each, were given for the amount for which it was necessary
222 or found necessary the American National Bank should give security to the Union National Bank. Now, did the American National Bank, prior to the making of the contract you have produced and marked Exhibit "1" owe anything to the Union National Bank?

A. No sir; not that I now remember of.

Q. Then these notes were not given to represent any indebtedness that existed prior to the execution of the contract marked Exhibit "1"?

A. No sir; they were given as a part of that contract, as I remember it.

Q. And there was, in fact, no indebtedness at that time from the American National Bank to the Union National Bank?

A. Not that I remember of. There was a controversy between the banks over a matter in court, but I think that was with reference to one of the officers of the American National, wasn't it, I don't remember about that, Captain; there was something in there but it had no reference as I now remember it, to these notes.

Q. Or to any other indebtedness existing at that time from the American National Bank to the Union National Bank?

A. No sir.

Q. They were given simply in the performance of the provisions of the written contract, marked Exhibit "1"?

A. Yes sir.

Q. Well, at the time of the making of that contract marked Exhibit "1", you and all of the officers and stockholders of the American National who had knowledge of the matter, and who co-operated with you in making the agreement, understood that the assets of the American National Bank would much more than liquidate all of its indebtedness, did you not?

A. Yes; on the face of them they certainly would.

223 Q. Now, when you speak of its being necessary to give to the Union National Bank security for that amount represented by these three notes of $67,000 each, what security did you have reference to?

A. Why, I mean that in view of the then existing condition the American National Bank was confronted with cash demands which it was not able to pay, or was about to be confronted with them, when those large deposits would be withdrawn, and in order to avoid the necessity of enforced liquidation, and as we concluded at the time, sacrifice the assets of the American National, we entered into this agreement with the Union National and in order to induce the Union National to assume our then present liabilities and pay our deposit accounts, we made that provision in the agreement that we would appoint Mr. Kimball trustee, and assign to him all the assets of the American National Bank to be held as security for the obligations which would remain due from the American Nation- after the Union National credited the American National with the cash on hand, and with the notes which the Union National was willing to take.

Q. That is, you mean the notes held by the American?

A. Yes sir.

Q. Or other assets held by the American National?

A. Yes, and after the Union National credited the account with the cash on hand, and the notes that they were willing to take as cash, out of the assets of the American National Bank there remained yet due in order to meet all the obligations of the American National Bank a balance represented by those three notes of $200,000, I think it is, if I remember right, and those notes were given to secure that balance.

Q. But the Union National Bank had not at that time paid the deposits, it had only agreed to pay them?

224 A. No, sir; it had only agreed to pay them at the time those notes were executed.

Q. So there was no indebtedness from the American National Bank to the Union National Bank?

A. None, only what was implied in or resulted from that contract, so far as I know.

Q. And is it not true that at that time the Union National Bank expected to liquidate the assets of the American National rapidly enough to meet the demands of the depositors of the American National Bank?

Each of the defendants object to the question as improper cross-examination.

A. It is true that all parties connected with the contract expected at that time to be able to realize on the assets of the American National within the time necessary to meet those notes.

Q. And is it not also true that these notes were given for the purpose of enabling the Union National Bank to carry them into their Bills Receivable Account and show assets offsetting the deposits which it had assumed in behalf of the American National Bank in lieu of the assets of the American National Bank which were not entered on the books of the Union National Bank?

Plaintiff objects as incompetent, immaterial and not proper cross-examination.

A. I am not able to answer that question, except to say that so far as I knew these obligations were given the same as any other obligations for an indebtedness which the Union National assumed for the American National and which, under that contract, the American National expected the Union National to pay, and therefore, gave these obligations to protect the Union National in paying that.

225 Q. The American National expected, and the Union National Bank assumed the obligation to pay the indebtedness of the American National to depositors out of the assets of the American National, did it not?

A. I never so understood it.

Q. You did not so understand it?

A. No sir; I supposed it was a general liability which they had assumed with reference to those.

Q. O yes, the Union National Bank bound itself absolutely to pay the American National Bank's depositors?

A. Yes, but I did not think there was any limit as to how they were paid.

Q. But the expectation of the parties was that the assets of the American National Bank would in fact furnish the funds with which to pay the depositors of the American National Bank?

Complainant objects as asking for the conclusion of the witness, absolutely immaterial, and not proper cross-examination.

A. O, yes, we all expected to realize enough out of the assets to more than pay those notes.

Q. And these notes were not given because of the existence of an obligation or debt at that time for the amount of them or because you anticipated an obligation or debt of that amount?

A. They were not given at the time for any debt which had previously existed from the American National Bank to the Union National Bank but they were given as a means of meeting the obligations which confronted the American National Bank which it was not able to meet at the time without making some terms.

Q. Well, the Union National Bank transferred the deposit accounts of the American National Bank to its own
226 books, did it not?

A. I do not know what the process was there.

Q. You were a depositor of the American National Bank?

A. Yes sir.

Q. And you say you drew your check and got your money?

A. I did; I transferred my account to the Union National, as I now remember it.

Q. That is the way in which the American National paid you?

A. Yes, the Union National paid me by giving me credit on my account with the Union National.

Q. Then you drew your check on the American National?

A. Yes, for whatever balance I had there at the time.

Q. For the mere purpose of transferring your account to the Union National? A. Yes sir.

Q. And the Union National Bank procured the other depositors to do the same thing so far as they did not demand the money, did it not? A. So far as I know yes sir.

Q. And that would necessitate the Union National Bank having some asset to offset the amount of the deposit of the American National that it assumed, in your case, would it not?

A. I presume it would, as a matter of banking business, in order to meet the requirements of the Comptroller of the Currency.

Q. So far as the American National Bank's cash on hand was concerned, and its Bills Receivable which the Union National accepted as cash, the Union National carried that right into its own assets?

227 A. That was my understanding, yes sir.

Q. And the amount of the American National Bank's indebtedness to depositors which was assumed by the Union National Bank and for which the Union National, did not get money or other assets of the American National Bank would

be a liability on the part of the Union National Bank for which they would have to have some form of assets? A. Yes sir.

Q. Now, is it not true that these three notes were executed for the purpose of giving them assets to offset that liability in view of the fact that the other assets of the American National Bank which the Union National Bank did not take absolutely passed nominally, at least, into the hands of Thomas L. Kimball, Trustee?

Complainant objects as incompetent, immaterial and not proper cross-examination.

A. It is true that those notes were given to the Union National Bank for the purpose of offsetting the liability which the Union National Bank assumed in the payment of the deposits of the American National to the extent of those notes.

Q. Now, you spoke a moment ago that the amount of those notes was the amount which it was found necessary that the American National Bank should give the Union National Bank security for; now you may explain what the security was that you had in contemplation when you spoke of that; that is, I want to know what the property was in a general way?

A. The security which the American National Bank agreed to give under the terms of that contract consisted of an Assignment to Thomas L. Kimball as Trustee for the use of the Union National Bank of all the properties and assets remaining belonging to the American National Bank, to be held and applied so far as necessary upon the liquidation of those notes, first, and then distributed after the notes were paid,
228 amongst the stockholders of the American National if anything remained.

Q. Now, then that security consisted of all the remaining assets of the American National Bank, after the Union National had taken out its cash items and such bills receivable as it was willing to accept as cash? A. Yes sir.

Q. And it consisted of promissory notes, mortgages and notes and some real estate, and the office furniture of the Bank of the American National Bank?

A. Yes, everything it had.

Q. What was done with those assets, that is, I mean what physical disposition or removal of them was made?

A. They were taken into the custody of Mr. Kimball by himself as Trustee, and controlled and collected and handled by him as long as he lived.

Q. They were, at the time the American National Bank had the custody and possession of them, at the corner of Fifteenth and Dodge Streets, were they not?

A. Prior to the execution of the agreement in question, yes sir, they were in the custody of the American National Bank at that location.

Q. To what place were they removed, if they were removed at all?

A. They were not in fact removed from that location; Mr. Kimball retained his office in the same location that he had been previous to that time.

Q. Well, where had the Union National Bank had its office prior to the making of this agreement, marked Exhibit "1"? A. At the corner of Sixteenth and Dodge.

Q. Then did the Union National Bank move into the offices of the American National Bank?

A. Yes sir; the next morning after the execution of this contract, or I don't know, may be that night, they were
229 there the next morning when I went down.

Q. And the assets of the American National Bank were not moved or disturbed at all?

A. Only to the extent of being placed in Mr. Kimball's custody and by him kept in some place in the bank there, I don't know just where he kept them.

Q. Well, he had been President of the American National Bank? A. Yes sir.

Q. And had a desk in the office of the American National?

A. Yes sir.

Q. And retained that desk after the Union National occupied those offices? A. Yes sir.

Q. And the Union National Bank continued to occupy the same vault the American National Bank had?

A. Yes, they continued the use of the vault.

Q. They used all the furniture and desks the American National had previously used and occupied?

A. Yes, they belonged to them then; they were a part of the subject matter of the contract.

Q. [Anf] the assets of the American National Bank were not removed from the room or vault where they had previously been kept?

A. They were not removed from the vault as I understood it; now, I don't know personally.

Q. I only want your personal knowledge.

A. I don't know what was done with them personally, because that was no part of my connection with the business; I can state that I know what was understood and di-
230 rected by the directors and the talk in the meeting of the Board in reference to the keeping of those assets.

Q. Mr. Kimball was also a director, was he not, of the Union National Bank, or immediately elected a director?

A. I think so, after this arrangement was completed I think he was elected a director of the Union National Bank.

Q. Had he previously been a stockholder or director if the Union National Bank? A. No sir.

Q. He became a stockholder at that time, did he not?

A. I presume so, although I do not know personally anything about that.

Q. What was his principal business?

A. Well, I don't think he had any special business excepting taking care of his own estate which was considerable, as I understood it, and was President of the American National Bank, so far as I know.

Q. As President of the American National he was not active in the management of the business, was he?

A. Yes sir.

Q. Was he? A. Yes sir.

Q. Spent his time in the office of the bank?

A. Yes sir; he was always present when I was there.

Q. Well, Minot of whom you have spoken, was the owner, or largely the owner of the building in which the American National Bank had its office, was he not?

A. I do not know how much of the stock of the Bank Building Company he had; I think he had some of it, but I don't know how much; I don't think he had a large amount of it.

Q. He was also a large depositor in the American National Bank? A. Yes sir; he had been.

231 Q. Over $50,000 at the time this agreement was made?

A. I don't recollect as to the amount then; he had been a large depositor.

Q. You do not know now that he had at the time the agreement was made over $50,000 in the American National?

A. No sir; I do not remember.

Q. Mr. Kimball was also a large depositor in the American National, was he not? A. Yes sir.

Q. And Dufrene was a large depositor? A. Yes sir.

A. And Dufrene also became a director of the Union National Bank immediately did he not?

A. I am not sure about that; I do not remember.

Q. And you yourself was a depositor in the American National Bank, you stated? A. Yes sir, a small one.

Q. Can you state what amount?

A. It would not run only my current account; it would run a hundred dollars or a couple of hundred; that would be the average size of it; it was not large at any time.

Q. Do you know the amount of Mr. Kimball's deposit?

A. No sir; I do not know.

Q. Well, Minot was not a director of the American National? A. No sir; I don't think so—wait—

Q. Was he a stockholder, of the American National?

A. No sir; I do not think he was; I would not be right sure whether he held any stock at that time or not.

Q. Can you explain how he came to be figuring with you and you representing him as an attorney and procuring this agreement to be made? A. Yes sir.

232 Q. You may do that?

A. The reason why that was so was because Mr. Minot as Trustee and investor of funds of various clients of his had invested funds in the National Bank Building Company, and the National Bank Building Company was the holder of, I think it was $65,000 or a large amount of the American National Bank stock.

Q. $75,000?

A. $65,000 I think it was; and Mr. Minot felt under obligations, as the representative of his clientage to take care of their interests as far as he could, and I was his attorney with reference not only to that but all other matters he had here in the city, which consisted of a good many different things, and he had been a friend of the American National Bank and sustained it by trusting deposits with it, and for that reason he was interested as the representative of those various interests, in having the arrangement made which was made, not because of any personal interest that he had, so far as I know, except as stated.

Q. You cannot give us the amount of the city or county or state treasurer's deposit with the American National Bank?

A. No, I do not remember now, Captain.

Q. You say you had notice from the city and county treasurer that they would demand the payment of the deposit soon?

A. Yes; the treasurers had notified the President Mr. Kimball, and he told us.

Q. Was it in writing?

A. I do not know whether it was or not; I almost think the county Treasurer did write a letter, but I am not sure.

Q. Well, the American National had some cash on hand at the time of the making of this agreement, did it not?

233 A. Yes sir.

Q. Do you know how much?

A. I do; it was sixty odd thousand, but I am speaking only from memory now.

Q. Do you think that included the cash items such as its deposits with reserve agents and correspondents?

A. Yes I think so.

Q. And all checks and drafts? A. Yes; I think so.

Q. $65,000, you think?

Q. About that; somewhere in that neighborhood; I am not positive as to the exact amount but it was in that neighborhood.

Q. And it never had or had not at that time failed to pay all demands made upon it?

A. No sir; not from the time our board of directors took charge of it.

Q. That was after the reorganization? A. Yes sir.

Q. That was something like a year prior to this?

A. Something like two years, I think.

Q. Who drew this agreement marked Exhibit No. 1, Mr. Baird? A. I did.

Q. Now, after it was drawn it was then submitted to the directors of the American National Bank? A. Yes, sir.

Q. And do you remember who of the directors were present?

A. I think the whole Board was present at the time; I am not absolutely sure as to that but I think so.

Q. At whose instance did you draw the agreement?

234 A. Well I might say I drew the agreement at the instance of both parties, that is, I did the legal work of drafting the agreement, after they had come together on terms and after we had agreed upon the details.

Q. When you say both parties, do you mean yourself and Mr. Minot and Mr. Kimball on one side, and on the other side Mr. Ford and Mr. Marsh?

A. Mr. Ford and Mr. Wattles were representing the Union National.

Q. That is what you mean? A. Yes sir.

Q. And how long after it was drawn was it before there was a meeting of the Board of Directors of the American National Bank?

A. It was the evening of the same afternoon; the negotiations had been pending for some days, I don't remember exactly how long, and we arrived at a conclusion of the negotiations in the afternoon of the day of the date of that agreement, and immediately upon its being drafted the directors were called together and we held a meeting and considered it and adopted it and ratified it.

Redirect Examination

By Mr. Macomber:

Q. Mr. Baird do you remember about how much actual cash there was on hand that was turned over?

A. As I stated in answer to Mr. Morsman, I think it was about $65,000.

Q. That would include cash items?

A. Yes, including sight drafts.

Q. Do you know how much actual money was on hand in the American National Bank?

A. No; I do not, but that amounted to the same thing as money; I do not recollect now.

235 Q. Now, in giving these notes, these notes were made two or three days after the Union National had taken the deposit accounts to pay off?

A. Well, I do not think it was so long as that; I think they entered at once on the investigation of the acc-unts, I mean the Bills Receivable of the American National Bank, which the officers of the Union National agreed to accept, and as the cash items was easily determined, and as soon as they arrived at those Bills Receivable which they were willing to take and the value of the furniture and so on, which were cash items, it was an easy matter to determine what there was back, and it was only a matter of figuring—I do not remember when those notes were executed, but it was shortly after the execution of the original contract.

WM. BAIRD.

Thereupon a recess was taken until 2 o'clock P. M. of said day.

Filed Dec. 30, 1901. Geo. H. Thummel, Clerk.

236 Omaha, October 29, 1901, 2 P. M.

The same parties being present as this morning, the taking of depositions under the annexed notice is resumed as follows:

Henry F. Wyman of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, to-wit:

Direct Examination.

By Mr. McCulloch:

Q. State your name; age and place of residence?

A. Henry F. Wyman; age 36, residence, Omaha, Nebraska.

Q. How long have you lived in Omaha, Mr. Wyman?

A. Very nearly 12 years.

Q. You may state in what business you were engaged in in Omaha during the year 1895 and prior thereto?

A. In the banking business.

Q. With what bank were you connected?

A. The American National Bank.

Q. In what capacity? A. Cashier.

Q. How long were you Cashier of that bank?

A. From April, 1890 until the present time, if the organization were still in existence.

Q. You may state, Mr. Wyman, whether as such Cashier you were acquainted with the stockholders of the bank, who they were? A. Yes sir, I am.

Q. What record, if any, did the bank keep as to the stockholders?

A. We kept a book in which the names and amount of stock were registered.

237 Q. Showing you a book, I will ask you what it is, if you will examine it?

A. This is the stock record of the American National Bank?

Q. From an examination of that book will you be able to state who the stockholders of the American National Bank were at the time that the bank went into voluntary liquidation?

A. Yes sir.

Q. You may state, Mr. Wyman, whether or not Thomas H. McCague was a stockholder at that time and the amount of shares of stock he held? A. Ten shares.

Q. You may state whether or not Alex. G. Charlton was a stockholder and the amount of shares he held?

A. Nine shares.

Q. Can you without having the names and questions repeated, give us from that book who the stockholders were and the amount of stock they held at that time?

A. I think I can.

Q. State who they were and the amount of stock they held?

A. Elmer C. Brownlee, 10 shares; A. R. Dufrene, 75 shares; Edgar M. Morsman, 75 shares; Philip Merger, 7½ shares; George G. Wallace, 75 shares; Wm. S. Poppleton, 56¼ shares; John S. King, 2 shares; William Wallace, of Warren, Ohio, 20 shares; Chas. F. Manderson, 10 shares; Anna C. Crowell, 9 3-4 shares; Chas. C. George, 15 shares; R. H. McClellan, 50 shares; Peter Frenzer, 15 shares; John N. Frenzer, 5 shares; Chas. H. Walworth, 22½ shares; Frank W. Wessells, 3 3-4 shares; Frank Graham 3 3-4 shares; James H. McCulloch, 25 shares; John P. Charlton, 7½ shares; C. W. Morton, 6 shares; Royal Wilson, 10 shares; Jacob Wead, 7½ shares; J. J. Brown, Jr., 5 shares; Jas.

I. Woodard, 2-3 shares; Viola Coffin, 7½ shares; Howard

238 B. Smith, 50 shares; Edward G. Glenn, 5 shares; Emily J. Robinson, 1½ shares; James H. Morton, 2 shares; George Morton, 1 share; Mary E. Morton, 1 share; William Wilson, 11¼ shares; H. F. Wyman, 58¼ shares; A. U. Wyman, 10 shares; F. R. McConnell, as trustee, 5 shares; John Speer, 10 shares; J. E. Patrick, 15 shares; R. L. Brownlee, 25 shares; Miss Caroline Carpenter, 18 shares; W. C. Beer, 6 shares; M. C. Acheson, 15 shares; George Marples, 10 shares; Arthur H. Flack, 5 shares; Meade C. Williams, 11¼ shares; James H. Conrad, 10 shares; T. R. Neal, 10 shares; J. H. Hawkins, 25 shares; Wm. Baird, 10 shares; Manufacturers National Bank of Boston, 25 shares; John L. McCague, 287 shares; Morris Levy 50 shares; National Bank Building Company of America, 615 shares; McCague Bros., 50 shares; Refus R. Bullock, 22½ shares; Alex. G. Charlton, Sec'y, 10 shares; Samuel Blackwell, 50 shares.

Q. You may state, Mr. Wyman, if you know who was the real owner of the 20 shares which stood in Alex. G. Charlton's name as Secretary? A. I never knew.

Q. As Cashier of the American National Bank, Mr. Wyman, did you have charge of and keep the records of the Bank and of the meetings of the directors and stockholders?

A. I did, yes sir.

Q. Calling your attention to a book which I will have the reporter mark as Exhibit "5" for identification, I will ask you to state what that book is?

A. This is the record book of the bank in which the minutes of the meetings of the stockholders and directors are recorded.

Q. And you may state who had charge of the keeping and the making of that record? A. I made the record.

Q. Calling your attention to page 245, of that re-
239 cord, you may state, beginning in the middle of the page with the words "Regular Directors Meeting", you may state what it is a record of?

A. It is a record of the regular directors' meeting held December 16, 1895.

Q. And what pages are covered by the record of that meeting? A. Part of page 245 and all of page 246.

Q. Calling your attention to the signature of Thomas L. Kimball, Prs., and Henry F. Wyman, Cas., as found on the middle of page 246 and also found at the bottom of page 246, you may state if you know whose signatures those are?

A. One is the signature of Mr. Thomas L. Kimball, the President of the American National Bank and the other is my signature as cashier of the bank.

Complainant now offers in evidence pages 245, commencing with the regular directors meeting about the middle of the page, and page 246, of the record which has just been identified as Exhibit 5, which the reporter may mark as Exhibit 6. (A copy of Exhibit 6 is found on page 218 hereof.)

Q. Calling your attention to page 248 of the book that has been marked Exhibit "5", you may state what record you find there, commencing with about the middle of the page?

A. Special Director's Meeting, December 21, 1895.

Q. Now, you may state what pages of the book Exhibit "5" the record of that meeting covers?

A. It covers part of page 248, all of pages 249, 250 and part of page 251.

Complainant now offers in evidence the record of the Directors' Meeting held December 21, 1895 as found on pages
240 248, 249, 240 and 251, in the book which has been identi-

fied as Exhibit "5", and ask the reporter to mark the same as Exhibit "7". (A copy of Exhibit "7" is found on page 221 hereof.)

Q. You may state, Mr. Wyman, whose signatures are signed to the record of that meeting just offered in evidence?

A. Thomas L. Kimball President, and Henry F. Wyman, Cashier.

Q. Those are the signatures of yourself and Mr. Kimball?

A. Yes sir.

Q. Calling your attention to another record in the same book, marked Exhibit "5", and commencing about the middle of page 251, and ending on that page, I will ask you what record that is?

A. It is a record of the Regular Directors' Meeting held January 14, 1896.

Q. And that record was kept also under your supervision?

A. It was, yes sir.

Q. And whose signatures are attached thereto?

A. Mr. Thomas L. Kimball, the President and myself, as Cashier.

Complainant offers in evidence the record as found on page 251 of the book marked Exhibit "5", of the Regular Directors' Meeting held January 14, 1896, and asks the reporter to mark it as Exhibit "8". (A copy of Exhibit "8" is found on page 226 hereof.)

Q. Calling your attention to the same Book, Exhibit "5", at page 252, I will ask you what record commences at the top of that page?

A. The record of the Annual Stockholders' Meeting,
241 held January 14, 1896.

Q. And what pages does that record cover?

A. All of pages 252, 253, 254 and part of page 255.

Q. Ending with what signatures, and in whose handwriting are they?

A. The signatures of Mr. Thomas L. Kimball, Chairman, Henry F. Wyman, Cashier and Secretary.

Complainant offers in evidence the record of the stockholders' Meeting held January 14, 1896, commencing on page 252 of the book marked Exhibit "5", and ending on page 255, with the signatures of the Chairman and Cashier and Secretary, and asks the reporter to mark it Exhibit "9". (A copy of Exhibit "9" is found on page hereof.)

Q. Calling your attention to another record which commences near the bottom of page 255 of the book marked Exhibit "5", you may state what record that is?

A. A record of Special Directors' Meeting held January 17, 1896.

Q. And it covers what pages?

A. Part of page 255 and all of page 256.

Q. And that record is signed by whom?

A. Thomas L. Kimball, President and Henry F. Wyman Cashier.

Complainant offers in evidence the record of the Directors. Meeting held January 17, 1896, commencing near the bottom of page 255 and ending at the bottom of page 256, as found in book marked "5", and asks the reporter to mark the same as Exhibit "10."

242 "A copy of Exhibit "10" is found on page 232 hereof.)

Q. Calling your attention to page 257 of this record book marked Exhibit "5", you may state what record is found on that page and [that] it is?

A. There is one of the printed circular letters addressed to the shareholders of the bank under date of January 17, 1896.

Q. And what was done with that circular letter and what was the occasion of its being issued?

A. Copies of the letter were sent to all stockholders.

Q. By whom, Mr. Wyman, was that circular letter mailed, if you know?

A. My recollection is that I mailed those letters but I am not positive of that.

Q. And under whose supervision was it done?

A. Under my supervision.

Q. According to the certificate that is on the circular letter that is found on that page? A. Yes sir.

Complainant offers in evidence the circular letter found on page 257, together with the certificate of the Cashier as to its being mailed and which the reporter will mark as Exhibit "11". (A copy of Exhibit 11 is found on page 234 hereof.)

Q. Calling your attention to page 258 of the record book identified as Exhibit "5", you may state what record is contained on that page?

A. It contains the record of the judges of election.

243 Q. Judges of what election, what meeting?

A. At the meeting of the stockholders of the American National Bank held January 14, 1896.

Q. This record was made under your supervision, that is the record of the report? A. It was, yes sir.

Complainant offers in evidence page 258 of the Book marked Exhibit "5", and will have the reporter mark it as Exhibit "12". (A copy of Exhibit "12" is found on page 236 hereof.)

Q. Calling your attention to the top of page 259 and ending about the middle of the page, with the signatures of the President and Cashier, you may state what record that is?

A. It is a record of the Special Directors' Meeting held February 25, 1896.

Complainant offers in evidence that part of page 259 containing a record of the Special Directors' Meeting described by the witness, and asks the reporter to mark it as Exhibit "13". (A copy of Exhibit "13" is found on page 237 hereof).

Q. Calling your attention to the record book marked Exhibit "5", beginning about the middle of page 259, with the words, "Special Stockholders' Meeting", you may state what record that is and what pages it covers?

A. That is a record of the Special Stockholders' Meeting held February 25, 1896, and it covers part of page 259, all of page 260 and part of page 261.

Q. Ending with what words?

A. Thomas L. Kimball, Chairman, Herry F. Wyman, Sec'y.

Complainant offers in evidence the record of the Special Stockholders' Meeting held February 25, 1896, as found on
244 pages 259, 260 and part of 261, in Record Book, Exhibit "5", and asks the reporter to mark this offer as Exhibit "14". (A copy of Exhibit "14" is found on page 238 hereof.)

Q. Calling your attention to what is marked as "Copy of Teller's Report", found on page 261, you may state what that refers to, page 261 of Exhibit "5"?

A. That refers to the result of the vote on the resolution to place the bank in voluntary liquidation that was cast on February 25, 1896, at the meeting of the shareholders.

Complainant offers that report in evidence as found on pages 261 and 262 of the record book marked Exhibit "5", and asks the reporter to mark it Exhibit "15." (A copy of Exhibit "15" is found on page 241 hereof).

Q. Calling your attention to the record as found commencing about the middle of page 262 and ending at the bottom of page 263, you may state what that is?

A. It is a record of the Special Directors' Meeting held February 27, 1896.

Complainant offers in evidence the record of the Special Directors' Meeting as found on pages 262 and 263 of the Record Book marked Exhibit "5", and asks the reporter to mark this offer as Exhibit "16". (A copy of Exhibit "16" is found on page 245 hereof).

Q. Calling your attention to the record which has just been offered in evidence and to the certificate mentioned therein, and to which you were directed to affix your name, being the certificate to the Comptroller of the Currency, you may state whether or not you carried out the instructions of the
245 Board of Directors in that regard and forwarded that certificate.

Each of the respondents object as not the best evidence and asking for the conclusion of the witness.

A. I presume I did.

Q. Well, what is your best recollection of it?

A. My recollection is that such certificate was forwarded to the Comptroller, that would be my recollection of it.

Q. And now with reference to the other notice which is in the same record which seems to be directed to the creditors of the American National Bank, did you also forward that notice?

Each of the respondents object as not the best evidence and calling for the conclusions of the witness.

A. I presume so; I do not know whether that notice was one to be sent to the Comptroller or not; that notice may have been a part of the certificate for voluntary liquidation.

Q. Now then, the certificate for voluntary liquidation which seems to be copied in this record, you may state whether or not that was a printed certificate which was forwarded from you to the Comptroller's office, if you know?

A. That is my recollection.

Q. You may state whether or not you carried out the instructions with reference to that matter?

Each of the respondents object as not the best evidence and asking for the conclusion of the witness.

A. My recollection is the instructions were carried out.

Q. Calling your attention to the Comptroller of Currency at that time, at the time the American National Bank
246 went into voluntary liquidation, you may state whether or not you know who was the Comptroller at that time?

A. Yes sir, I do.

Q. Who? A. Mr. James H. Eckles.

Q. Do you know Mr. Eckles' signature? A. I do.

Q. Calling your attention to the letter found on page 265 of this record marked Exhibit "5", you may state whose signature that is attached to that letter?

A. The signature of Mr. James H. Eckles, Comptroller of the Currency.

Q. Who received that letter, if you know? A. I did.

Q. And did you, as Cashier, make it a part of the record of the American National Bank as it is attached there?

A. I did, yes sir.

Q. You may state if you know whether or not that was in response to any letter which you had written? A. It was.

Q. Did you keep a copy of the letter that you wrote?

A. I did.

Q. Calling your attention to a letter which is found on page 264 of this record book marked Exhibit "5", you may state what that is?

A. It is a letter to the Comptroller of the Currency from myself as Cashier.

Complainant now offers in evidence the copy of the letter found on page 264 of the record book marked Exhibit "5", and asks the reporter to mark it as Exhibit "17". (A copy of Exhibit "17" is found on page 245 hereof.)

Complainant also offers in evidence the letter identified by the witness as found on page 265 of the record book
247 marked Exhibit "5" and signed James H. Eckles, Comptroller, and asks the reporter to mark it as Exhibit "18". (A copy of Exhibit "18" is found on page 246 hereof.)

Q. What steps Mr. Wyman, if any, did you take toward giving the notice as to the liquidation of the bank and to its publication?

A. I caused to be published in the Omaha Mercury a notice to that effect?

Q. Did you receive a proof of publication?

A. I did, yes sir.

Q. In the Omaha Mercury? A. Yes sir.

Q. Have you a record of that proof? A. Yes sir.

Q. Where is it found?

A. On page 270 of the record book.

Complainant offers in evidence the proof of publication in the Omaha Mercury of the notice attached to the proof as found attached to page 270 of the record book marked Exhibit "5", and asks the reporter to mark it Exhibit "19". (A copy of Exhibit 19 is found on page 247 hereof.)

Q. You may state, Mr. Wyman, whether you made publication in any other paper besides the Omaha Mercury, and if so, what?

A. The notice was also published in the American Banker.

Q. What paper is the "American Banker", and where is it published?

A. It is a weekly financial publication in New York
248 City.

Q. Did you receive proof of publication of such notice? A. I did.

Q. And did you make any record of it in your record book?

A. I did

Q. And on what page is it found?

A. Page 272, of the record book Exhibit "5".

Complainant offers in evidence the proof of publication of the "American Banker" as found attached to page 272 of the record marked Exhibit "8", and asks the reporter to mark such proof of publication as Exhibit "20". (A copy of Exhibit "20" is found on page 249 hereof.)

Q. Calling your attention to a letter found on page 274 you may state if you know the signature of that letter, and whose it is?

A. It is the signature of Mr. James H. Eckles, Comptroller of the Currency.

Complainant offers in evidence the letter found on page 274 of Exhibit "5" and asks the Reporter to mark it as Exhibit "21". (A copy of Exhibit "21" is found on page 250 hereof).

Q. Calling your attention to page 268 of this record book, marked Exhibit "5", you may state what that letter is?

A. It is a letter from the Assistant treasurer of the United States.

Q. To what does it pertain?

A. It refers to the deposit of lawful money of the United States for the redemption of circulation.

Q. Was that letter received in the regular course of business with reference to the liquidation of the bank?

Yes sir.

249 Complainant offers in evidence the letter found on page 268 of Record Book Exhibit "5" and asks the reporter to mark it as Exhibit "22". (A copy of Exhibit "22" is found on page 251 hereof).

Q. Mr. Wyman, I wish you would turn in this record book, Exhibit "5", to the stockholders' meeting in January 1895.

A. Yes sir. (witness turns to record).

Q. On what pages is it found?

A. It is found on part of page 215, all of page 216 and part of page 217.

Complainant offers in evidence the record of the Annual Stockholders' Meeting as found in Record Book Exhibit "5",

commencing at the middle of page 215 and ending at the middle of page 217, and asks the [reported] to mark it Exhibit "23". Copy on page 252.

Q. Calling your attention now again to the record of the Directors Meeting Held December 21, 1895, and which has been introduced in evidence as Exhibit "7", you may state what, if anything, was done toward the signing of the contract embodied in that letter, was there a contract signed?

A. There was, yes sir.

Q. Calling your attention to a paper which has been marked as Exhibit "1", in this case, you may state whether or not that is the contract to which you refer?

A. That is the contract, yes sir.

Q. You may state in whose handwriting is the signature, "The American National Bank of Omaha, by Thomas L. Kimball, President"?

250 A. It is in the handwriting of Mr. Thomas L. Kimball.

Q. Are you acquainted with the handwriting of the signature for the Union National Bank? A. Yes sir.

Q. And in whose handwriting is that?

A. Mr. William W. Marsh.

Q. You may state whether or not you know that Mr. Kimball was President and Mr. Marsh was President of the respective banks at that time? A. Yes sir, I do.

Q. You may state if you know whose signature and handwriting the words "Attest, Henry F. Wyman, Cas." are in, to this paper, Exhibit "1"?

A. They are in my handwriting.

Q. Mr. Wyman, you may state, also, if you know, in whose handwriting the subsequent words, Attest, Charles E. Ford, Cashier, are? A. Mr. Charles E. Ford.

Q. Was he cashier of the Union National Bank at that time?

A. He was.

Q. And you were cashier of the American National Bank?

A. Yes sir.

Q. Mr. Wyman, in this contract are found these words: "And to this end the party of the first part agrees to execute and deliver to the party of the second part its three promissory notes of equal sums for the amount of liabilities which the party of the second part may assume after crediting the full amount of cash on hand and bills receivable, and other assets which may be accepted by the party of the second part on examination, which notes shall draw interest from date at the rate of six per cent per annum, payable quarter-annually and be payable in one, two and three years from date, re-

251 spectively, and shall be non-negotiable". You may state whether you had anything to do with the closing up

of the matters of the American National Bank under this contract? A. I did, yes sir.

Q. Did that result in the giving of notes as described in that? A. It did, yes sir.

Q. Calling your attention to three notes which have been identified as Exhibits "2", "3" and "4", you may state whether those are the notes which were given in compliance with that contract? A. They are, yes sir.

Q. You may state by whom those notes are signed, if you know?

A. They are signed by the American National Bank, by Thomas L. Kimball, President, attested by Henry F. Wyman, Cashier.

Q. Each of them? A. Each note, yes sir.

Q. Calling your attention to page 278 in this record book marked Exhibit "5", and commencing about the middle of the page, you may state what that is a record of?

A. It is a record of the regular stockholder's Meeting of January 12, 1897.

Q. State whether or not at that meeting a report was submitted to the stockholders and if it is embodied in the record of that meeting? A. It is, yes sir.

Q. And by whom is it signed.

A. Thomas L. Kimball, Trustee, Henry F. Wyman, Cashier.

Complainant offers in evidence the record of the stockholders' meeting of January 12, 1897, commencing about
252 the middle of page 278 and ending on Page 282, and asks the reporter to mark it Exhibit "24". Copy on page 255.

Each of the defendants object to the introduction of Exhibit "24" as irrelevant and incompetent.

Q. Calling your attention to this record which has just been offered in evidence, Exhibit "24", and particularly to the report embodied in it as found on page 279, you may state what that report is, it is a comparative statement between what dates?

A. It is a comparative statement of the bank between December 21, 1895 and January 1, 1897.

Q. Calling your attention to the item in that report under the heading of December 21, 1895, and of Deposits, $239,947.69, you may state what had become of those deposits, they not appearing in your opposite side, of January 1, 1897?

A. They had apparently been paid.

Q. Well, are you able to state in what way they were paid, are those the deposits which were assumed by the Union National Bank? A. Yes sir.

Q. So when you say they were paid, you mean they were paid by the consummation of the contract which has been referred to? A. Yes sir.

Q. Calling your attention to the Bills Payable, $50,000 under date of December 21, 1895 and to the Bills Payable of $184,000, under date of January 1, 1897, you may state how that difference was made up, if you know?

A. The $184,000 represented the notes given by the
253 American National Bank to the Union National Bank, the $50,000 under date of December 21, 1895, having been disposed of, paid.

Q. And by whom was that paid?

A. By the Union National Bank.

Q. Now, when you say the $184,000 represents the notes given, do you refer to these three notes which have been shown to you as Exhibits "2", "3" and "4"?

A. Yes; I refer to that amount which was at that time unpaid on those notes.

Q. Calling your attention to this report as found on page 279 of this Exhibit "24", to the item of Bills Rediscounted, $4,880.64, as found under date of December 21, 1895, and seems to disappear under date of January 1, 1897, you may state what became of that item, and what it is?

A. The payment of that item was assumed by the Union National Bank and disappeared from our statement.

Q. And the item of overdraft with the Union National Bank, $99,85, did the American National Bank keep an account with the Union National Bank at that time?

A. I don't know whether it was the account of the American National with the Union National or Mr. Kimball's account with the Union National.

Q. As trustee?

A. As trustee; I don't recall the character of the account.

Q. Now, Mr. Wyman, you may state what was done between the officers of the American National Bank and the Union National Bank after the signing of this agreement and which resulted in the giving of these three notes, marked Exhibits "2", "3" and "4"?

A. The Union National Bank took possession of the
254 assets and property of the American National Bank, all of which were surrendered by the officers of the American National Bank to the Union National Bank.

Q. Well, you misunderstand my question I think. What method was pursued which resulted in the giving of those three notes, Exhibit "2", "3" and "4"?

A. I do not believe I know just what you are getting at.

Q. How do you arrive at these amounts?

A. We aggregated the indebtedness of the American National Bank and deducted from that the amount of cash and notes that the Union National took into its—the amount of cash

it took into its cash and the amount of notes it took on to its Bills Receivable, the notes it assumed as a part of its own notes.

Q. When you say any notes it assumed as part of its own notes, do you mean notes which were then held by the American National Bank and which the Union National Bank was willing to take at their face. A. Yes sir.

Q. So they took certain notes of the American National just the same as they took cash? A. Yes sir.

Q. And then the $201,000 was arrived at by taking the difference between the amount of cash and cash securities which the Union National took and the liabilities which it assumed, is that right? A. That is right.

Q. Now then, did you continue in the employ of the American National Bank after these notes were given?

A. No; I continued with Mr. Kimball—I continued in the employment of Mr. Kimball to take care of the matters
255 for him.

Q. But did you continue, and were not you elected susequently as cashier of the bank? A. I think so, yes sir.

Q. Well, did you continue as cashier of the American National Bank? A. Yes sir.

Q. You say that you were in the employment, that is you were working with him, Mr. Kimball?

A. Under him, under his directions.

Q. In doing what.

A. In looking after the collections and taking charge of any matters in relation to the old American.

Q. The collection of the old assets of the American National? A. Yes sir.

Q. Now, as these assets would be collected, Mr. Wyman, you may state what would be done with the money?

A. The assets as collected were deposited in the Union under this account, that I don't know whether it was kept in the name of the American or Mr. Kimball, I cannot recall that, and paid out of his checks for various purposes, and some applications were made on those notes.

Q. That is net amounts, whenever you had an amount which was sufficient to apply on the note you wou l make a payment on the note, is that it? A. Yes, that was true.

Q. You may state, Mr. Wyman, how long you continued with Mr. Kimball or under Mr. Kimball in the work of collecting these assets?

A. Until April 1, 1897, I think it was; it was March or April, 1897.

256 Q. Was there any one else assisting you and Mr. Kimball in their collection?

A. Not at that time.

Q. And after that time, was there anyone assisted Mr. Kimball do you know? A. Yes sir.

Q. Do you know who it was? A. Mr. James Burness.

Q. Did he go in at the time you ceased work?

A. About that time.

Q. Calling your attention to a paper which I will have the reporter mark as Exhibit "25", I will ask you if you ever saw that paper before? A. Yes sir.

Q. Did you see any of the parties place their signature on the paper?

A. I placed my own there; I don't know about the others.

Q. Calling your attention to the first signature, you may state if you know in whose handwriting that is, that is, if you know the handwriting? A. Yes sir.

Q. Whose is it? A. Mr. John C. Wharton.

Q. That is, you mean the name John C. Wharton, or the balance of the signature, National Bank Building Co.?

A. National Bank Building Co., of America by John C. Wharton, Attorney in fact.

Q. You may state if you know whose handwriting the next signature is? A. Mr. Thomas L. Kimball.

257 Q. You know his signature? A. Yes sir.

Q. You may state whether or not you know the handwriting of the next signature? A. Yes sir.

Q. And whose is it? A. Mr. William Baird's.

Q. You may state whether or not you know the handwriting of the next signature? A. Yes sir.

Q. And whose is it? A. Mr. E. C. Brownlee.

Q. You may state whether or not you know the handwriting of the next signature? A. Yes sir.

Q. Whose is it? A. Mr. Alfred R. Dufrene.

Q. You may state whether or not you know the handwriting of the next signature? A. Yes sir.

Q. Whose is it?

A. The signature is Anna C. Crowell by Thomas H. McCague, attorney in fact.

Q. By whom was it written, if you know?

A. Thomas H. McCague.

Q. You may state whether or not you know the handwriting of the next signature? A. Yes sir.

Q. Whose is it? A. Mr. Thomas H. McCague.

Q. Do you know the handwriting of the next signa-

258 ture? A. Yes sir.

Q. Whose is it?

A. It is the signature of McCague Brothers.

Q. Do you know who wrote it?

A. Thomas H. McCague wrote it.

Q. Do you know whether or not he was a member of the firm of McCague Bros.?
A. That was my information, yes sir.
Q. Do you know the handwriting of the next signature?
A. Yes sir.
Q. Whose is it? A. Mr. John L. McCague.
Q. Do you know the handwriting of the next signature?
A. Yes sir; that is, I know the attorney in fact.
Q. Who wrote it?
A. William L. McCague, by John L. McCague, [attornet] in fact.
Q. And written by whom? A. Mr. John L. McCague.
Q. Do you know the handwriting of the next signature?
A. Yes sir.
Q. Whose is it? A. Mr. E. M. Morsman.
Q. Do you know the handwriting of the next signature?
A. Yes sir.
Q. Whose is it? A. Mr. Alexander G. Charlton.
Q. Do you know the handwriting of the next signature?
A. Yes sir.
Q. Whose is it?
A. Mr. Alexander G. Charlton, Secretary.
259 Q. Written by whom?
A. Mr. Alexander G. Charlton.
Q. Do you know the handwriting of the next signature?
A. Yes sir.
Q. Whose is it? A. J. J. Brown, Jr.
Q. Do you know the handwriting of the next signature?
A. Yes sir.
Q. Whose is it? A. Henry F. Wyman.
Q. That is yourself? A. Yes sir.
Q. Do you know the handwriting of the next signature?
A. Yes sir.
Q. Whose is it? A. Mr. Morris Levy.
Q. Do you know the handwriting of the next signature?
A. Yes sir.
Q. Whose is it? A. Mr. A. U. Wyman.
Q. Do you know the handwriting of the next signature?
A. Yes sir.
Q. Whose is it? A. Mr. George G. Wallace.
Q. Do you know the handwriting of the next signature?
A. Yes sir.
Q. Whose is it? A. Mr. M. C. Acheson.
Q. Do you know the handwriting of the next signature?
A. Yes sir.
260 Q. Whose is it? A. Mr. Charles W. Morton.
Q. Do you know the handwriting of the next signature? A. No, I do not.

Q. Do you know the handwriting of the next signature?
A. No sir.
Q. Do you know the handwriting of the next signature?
A. No sir.
Q. Do you know the handwriting of the next signature?
A. Yes sir.
Q. Whose is it? A. Mr. James H. Conrad.
Q. Do you know whose handwriting the next signature is in? A. Yes sir.
Q. Whose is it? A. Mr. Charles C. George.
Q. Do you know the handwriting of the next signature?
A. Yes sir.
Q. Whose is it? A. Mr. T. R. Neal.
Q. You may state whether or not these persons whose handwriting you have identified to this paper marked Exhibit "25" are the same persons—

Question withdrawn.

Q. Do you know the handwriting of the list of signatures on this paper? A. No, I do not think I do.
Q. You may state whether or not the signature which you have [identitied] to this Exhibit "25" are the signatures of the persons who held stock in the American National Bank bearing the same names which have been identified by you?
261 A. They are.

Cross-Examination

By Mr. Morsman.

Q. At what date, Mr. Wyman, was this paper, marked Exhibit "25", some of the signatures to which you have identified, signed? A. I do not know sir.
Q. Before or after January 1, 1896?
A. It appears to me it was after January 1, 1896.
Q. Do you know who procured the signatures?
A. No; I cannot recall that.
Q. What duties did you have to perform and did you perform as Cashier of the American National Bank after December 21, 1895?
A. My principal duty was the keeping of records of the bank as cashier;
Q. You mean by that the records of the stockholders' meetings and director's meetings? A. Yes sir.
Q. And those were the meetings which were held with reference to the so-called voluntary liquidation? A. Yes sir.
Q. The assets of the bank had all been turned over to the Union National Bank? A. Yes sir.
Q. And its liabilities assumed by the Union National Bank?
A. Yes sir.

Q. These three notes that you have testified about, marked Exhibits "2", "3" and "4" represent, I believe you said, the difference between the amount of liabilities assumed by the Union National Bank and the amount of assets which it received from the American National Bank as cash?

A. Yes sir.

Q. Under the agreement of December 21, 1895?

262 A. Yes sir.

Q. The American National Bank did not owe the Union National Bank any money at that time, did it?

A. At what time, sir?

Q. December 21, 1895, and afterwards?

A. For a few days immediately after this arrangement was consummated there was a balance which was subsequently wiped out through some collections that were made, that is, the notes aggregating $201,000 were made of even $67,000 each at the request of Mr. Ford, at his suggestion that a balance, I think of $10,000 or $12,000 which we expected within a few days would be paid into the Union, and consequently it was not necessary to take notes including that amount, whatever it was.

Q. That was not included in the three notes of $67,000 each?

A. No sir, that was not included.

Q. Then those notes were given to the Union National Bank for the purpose of offsetting liabilities of the American National Bank which the Union National had assumed?

A. Yes sir.

Q. And neither you nor any of the officers of the American National Bank or the Union National Bank at the time expected that the American National Bank would have to pay anything to the Union National Bank under that contract of December 21, 1895, did they?

Complainant objects as calling for a conclusion and not proper cross-examination, and as the testimony of the attorney rather than of the witness.

A. We expected the assets to pay that indebtedness.

263 Q. And the assets turned over to the Union National largely exceeded the amount of these three notes at their face value? A. Yes sir.

Q. You were employed by Mr. Kimball, were you not, acting in his capacity as trustee, as he is designated in that contract of December 21, 1895? A. Yes sir.

Q. And he paid you for your services? A. Yes sir.

Q. So that you were representing him in the collection of the assets of the American National Bank which were turned over to the Union National Bank? A. Yes sir.

Q. At the time of the passage of the resolution of the stockholders directing the directors of the American National to take steps looking to the liquidation of the American National Bank and the subsequent proceedings of the American National Bank ostensibly for its voluntary liquidation, the American National Bank had no assets, had it? A. No sir.

Q. And its liabilities had been assumed by the Union National Bank? A. Yes sir.

Q. Well, what then was done by the American National, its directors or officers in the way of liquidating the business of the bank?

A. We went through the form prescribed by the National Banking Law.

Q. Passing the necessary resolutions? A. Yes sir.

264 Q. And gave the notice? A. Yes sir.

Q. But in fact there was nothing to liquidate, was there? A. No sir.

Q. It was a mere form.

A. We went through the form, that was all, yes sir.

Q. Did Mr. Kimball himself exercise personal supervision over the collection and disposition of the assets turned over by the American National Bank to the Union National Bank, or was that under your care and the care of Mr. Wattles of the Union National?

A. I looked after the details under Mr. Kimball's instructions and the disposition of the funds and the settlement of the various collections were jointly considered by Mr. Kimball and the officers of the Union National Bank.

Q. If you were making a collection of some debtor of the American National Bank you called in Mr. Wattles to take his advice and direction in regard to what you should do in the matter?

A. Mr. Kimball usually took that matter up with him in nearly every instance.

Q. It was in fact all carried on under the direction and supervision of Mr. Wattles of the Union National Bank, was it not?

Complainant objects as an attempt to put in testimony on the part of the attorney and not proper cross-examination.

A. It was done after joint consultation excepting where collections were made which paid the full amount of the amount due, but where any compromise was entered into, or any matter taken up which required concessions, it was taken up

265 with the Union National for their consent and suggestion.

Q. The Union National had then taken possession of the office room occupied by the American National? A. Yes sir.

Q. And the assets of the American National which were turned over to the Union National were kept in that office?

A. Yes sir.

Q. And kept in the same vault with the Union National Bank's business? A. Yes sir.

Q. Now, when the transfer was made December 21, 1895, the Union National took all of the cash items then held by the American National Bank, did it not, in its own possession?

A. Yes sir.

Q. And all of the Bills Receivable of the American National Bank which the Union National Bank decided to accept in lieu of cash or as the equivalent of cash? A. Yes sir.

Q. And the Union National, at the same time carried on its books all the deposit accounts of the American National Bank, did it not?

A. They were transferred from the American National to the Union National, yes sir.

Q. So they would show a liability on the part of the Union National to the depositors of the American National Bank?

A. Yes sir.

Q. And the Union National Bank also assumed the Bills Payable of the American National Bank which was also a liability? A. Yes sir.

266 Q. So you deducted the assets which the Union National accepted as cash from this liability assumed by the Union National in order to ascertain the amount for which these notes were given, these three notes marked Exhibits 2, 3, and 4? A. Yes sir.

Q. Is it not true, Mr. Wyman, that the Union National desired those three notes merely for the purpose of showing assets to offset the liability which it had assumed in excess of the cash and Bills Receivable which it has accepted as cash from the American National Bank?

Complainant objects as not proper cross-examination, an attempt to put words in the mouth of the witness, and as an attempt to get him to construe the contract.

A. I could not answer that question as I was not in touch with the officers of the Union National Bank on matters of this contract; I did not know what their intentions were.

Q. You said, I believe, that the American National Bank did not owe the Union National Bank that amount of money or any portion of this $201,000 at that time?

Mr. McCulloch: He has not said that at all.

Q. It is true, is it not, Mr. Wyman, that at the time of the execution of these notes, December 23, 1895, the American National Bank did not owe to the Union National Bank $201,000 or any portion of that sum?

A. Well, we had turned them over all of our assets.

Q. Well, the American National Bank did not owe that sum or any portion of it, did it?

A. I do not know how to answer that question.

267 Q. Well, if you have any doubt about it, will you state anything out of which that indebtedness arose, or any part of it?

A. The indebtedness arose through the assumption by the Union National Bank of the deposits and Bills Payable and other indebtedness of the American National Bank.

Q. Now, on December 23, 1897, the Union National Bank had not paid those deposits, had it?

A. No; they had not paid them.

Q. They had merely agreed to assume them and had given notice of this assumption? A. Yes sir.

Q. So there was not any indebtedness whatever between or from the American National Bank to the Union National Bank unless it arose out of this contract of December 21, 1895?

A. That is the only way it arose.

Q. You have testified with reference to a report set forth in a stockholders' meeting under date of January 12, 1897, purporting to be signed by yourself and approved by Mr. Kimball, and containing a comparison of assets and liabilities of the American National Bank December 21, 1895, and January 1, 1897, now that statement was designed by you, was it not, to show the progress of the liquidation that you and Mr. Kimball were making pursuant to the contract of December 21, 1895. A. That was the purpose of the statement, yes sir.

Q. And when you say that the deposits $239,947.69, had at the date of this report been paid you mean that they had simply been transferred to the books of the Union National Bank?

A. They had been paid so far as the American National Bank was concerned.

268 Q. You do not mean to say they had all been paid to the depositors?

A. We knew nothing about that, no sir.

Q. You did not know what portion had been paid to the depositors? A. No sir.

Q. Of course, any depositor that demanded the money got it? A. Yes sir.

Q. But if he continued to have his account remain with the Union National Bank, why they simply kept the account?

A. Yes sir.

Q. And in this report, so far as you set forth Resources under date of January 1, 1897, such resources consisted of the assets turned over by the American National to the Union National, and which had not been converted or liquidated in money? A. Yes sir.

Q. Assets which you and Mr. Kimball were still trying to collect? A. Yes; that represents those assets.

Q. Loans and discounts, $245,918.54, was the amounts of notes or Bills Receivable which the American National had turned over to the Union National under the contract of December 21, 1895, and which still remained not collected?

A. Yes sir.

Q. And the item of stocks, securities, claims, etc., $51,394.63, was also assets turned over in the same way? A. Yes sir.

Q. And the item of real estate owned, $54,980.97, how was that transferred from the American National Bank to the Union National Bank, if you know?

A. There was no transfer of any titles.

269 Q. No deeds made? A. No deeds made, no sir.

Q. Was there no deed made to Thomas L. Kimball, Trustee, of the transfer of any kind other than the contract of December 21, 1895? A. No sir; none that I can recall.

Q. What was this cash item marked in litigation $5,000?

A. That was a certificate of deposit issued by the Union National Bank which was held by the American National Bank and was in litigation between the two banks.

Q. That litigation arose before December 21 1895, did it not? A. I think it did, yes sir.

Q. And the item of profit and loss, in Resources, $26,805.71, what is that item?

A. That was the aggregate of the items charged off to that account.

Q. Well, it was increased from December 21, 1895 about $14,000, how did it come to be increased?

A. That was increase-, through the charging off of what we considered bad debts.

Q. In the process of your and Mr. Kimball's liquidation?

A. Yes sir.

Q. Bad debts and discounts to debtors during settlements with them?

A. Yes, various items; if a note were settled for a portion of its face, of necessity the balance unpaid would have to be charged to profit and loss.

Q. And in the column of Resources it represents loss? A. Yes sir.

270 Q. Did Mr. Kimball keep a set of books while you and he were making these collections?

A. Yes; a set of books was kept, and was kept with--

Q. And was kept with reference to these particular collections and these particular assets, I mean? A. Yes sir.

Q. Now, when you say that these assets were turned over to the Union National Bank, were you working for the Union National Bank in collecting these assets? A. No sir.

Q. Was Mr. Kimball drawing a salary from the Union National Bank for the collection of these assets?

A. I do not know.

Q. So far as you know he was not?

A. Yes sir; so far as I know he was not.

Q. And when you say that the assets were turned over to the Union National Bank, don't you simply mean that the assets were in the same office with the Union National Bank, but under the control of you and Mr. Kimball?

Complainant objects as leading and being an attempt to put words in the mouth of the witness, testimony, of the attorney rather than the witness.

A. All the assets were turned over to the Union National Bank.

Q. Explain to us what you mean by that, was there any difference between the turning over of the cash and the cash items and these assets which you and Mr. Kimball were trying to collect?

271 A. The cash and cash items—the cash went into their cage, into their cash; the bills receivable which they took, that is the notes, went into their books; the other assets were kept intact for liquidation under the direction of Mr. Kimball.

Q. Now, in what way were they turned over to the Union National Bank?

A. When the Union National Bank came into the office they took possession of everything that was there.

Q. That was all—the mere fact that the Union National came in there and transacted its business, and these assets Mr. Kimball never moved out, did he? A. No sir.

Q. Then there was a difference even in your mind, was there not, as to how the cash and cash items and bills receivable which were taken as cash by the Union National Bank and these other assets which Mr. Kimball controlled in the way they were turned over?

Complainant objects as leading and suggestive.

Q. Was there a difference?

A. There was a difference in the way that I state.

Q. Was there any transfer of the real estate of the American National Bank to the Union National Bank?

A. No sir; not in the way of making any deeds or formal transfer.

Q. Was there any transfer of the individual notes of the American National Bank which Mr. Kimball and you were attempting to collect to the Union National Bank?

A. No endorsement of those notes, no sir.

272 Q. In what way were the Bills Receivable which were taken as cash, turned over to the Union National Bank, were they endorsed to the Union National?

A. I cannot recall that; I am under the impression they were, but I am not certain about that.

Q. Those items Mr. Kimball and you had nothing whatever to do about collecting? A. Nothing at all, no sir.

Q. Do you know whether or not these items which Mr. Kimball and you had charge of went on to the books of the Union National Bank or not? A. No, I do not.

Q. You do not know whether they did or not?

A. I never knew anything about the books of the Union National.

Q. Did you ever hear of their being on those books during the year and a quarter that you were there? A. No sir.

Q. So far as you know they never did go on the books of the Union National?

A. I never knew anything about that fact, no sir.

Q. You never heard they did?

Complainant objects as immaterial.

A. No sir.

Q. Where were these assets kept which you and Mr. Kimball were controlling?

A. At night they were kept in the vault; in the day time they were on my desk.

Q. And who took them back and forward from the vault to your desk? A. I did.

273 Q. At the time of this exchange which resulted in the giving of these three notes, Exhibits 2, 3, and 4, you were officing at that same place as cashier of the American National Bank, were you not? A. Yes sir.

Q. Just before the change? A. Yes sir.

Q. And then when the Union National came down there and took charge of the office to transact its business you and Mr. Kimball stayed there with your desks? A. Yes sir.

Q. And controlled in the manner you have just described these assets which you were collecting? A. Yes sir.

Q. How many vaults are there in that office? A. Two.

Q. In which vault did you keep your papers?

A. In the book vault.

Q. And was that the same vault in which the Union National kept its assets, that is the current business of the Union National Bank?

A. I don't know where they kept their notes and Bills Receivable.

Q. But you kept yours in what is called the book vault?

A. I kept mine in the book vault, yes sir.

Q. You stated on cross-examniation that you simply went through the form of liquidation, did you have anything to do or you did have something to do, did you not, with the Treasurer and Comptroller with reference to your bonds and your circulation, etc. A. Yes sir.

274 Q. That was done by the American National Bank under the orders of its stockholders? A. Yes sir.

Q. Done by you and Mr. Kimball?

A. My recollection is that the law states how that is to be done, be done by the cashier, and the forms sent by the Comptroller are with that view.

Q. And whatever was done with reference to that you did?

A. Whatever was necessary to do, those forms to be filled out, I did.

Redirect Examination

By Mr. Macomber.

Q. Just describe what was done, Mr. Wyman?

A. We had $50,000 of United States bonds which were sold.

Q. Deposited to secure circulation?

A. Yes, we sold those bonds and instructed the Bank in New York to forward to the Comptroller or Treasurer of the United States $45,000, to take up the circulation, or about that amount, whatever was necessary, and the proceeds were remitted here and went into the general collection fund.

Q. You sold your bonds through a New York Bank?

A. Yes sir.

Q. For money which he deposited or of which he deposited $45,000 for the redemption of your outstanding currency?

A. Yes sir.

Q. And do you remember how much the bonds were sold for?

A. My recollection is that the bonds were sold for about $1,08 or thereabouts; I could not say.

Q. So there was something near $9,000 over and above the amount required for the redemption of your currency?

A. No; we had about $50,000 of bonds, so that we
275 had about from $4,000 to $5,000 premium—yes, in addition to the $5,000—about $9,000, that is true, over and above the circulation.

Q. And that was treated just like all other accounts of the American National Bank? A. Yes sir.

Q. Under this contract of December 21, 1895? A. Yes sir.
Q. And you attended to that matter and got the money?
A. I attended to it and got the money, yes sir.

The further taking of depositions under the annexed notice is adjourned until tomorrow morning at 10 o'clock.

HENRY F. WYMAN,

Filed Dec. 30, 1901. Geo. H. Thummel, Clerk.

276 Omaha, Nebraska, Oct. 30, 1901.

The further taking of testimony under the annexed notice is now resumed, the same parties being present as on yesterday.

H. E. Rainey, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows:

Direct Examination

By Mr. Macomber:

Q. You may state your name, age and residence, Mr. Rainey? A. Henry E. Rainey, age 37; residence Omaha.
Q. How long have you lived in Omaha, Mr. Rainey?
A. Nearly 16 years.
Q. What is your present business?
A. General Bookkeeper at the Union National Bank.
Q. How long have you been in that position?
A. Twelve years.
Q. Do you remember the instance of the Union National Bank taking the place of business of the American National Bank? A. Yes sir.
Q. What was your business at that time?
A. I was the general bookkeeper of the Union National Bank at that time.
Q. Were you present at the time the Union National entered upon the business in the building that it took from the American National Bank? A. Yes sir.
Q. You remember the fact of the contract that was made between the two banks, do you? A. Yes sir.
277 Q. Do you know about the notes that the Union National Bank were to take absolutely as theirs of the assets or did take? A. Yes sir.
Q. You may state how, when the Union National Bank took possession there, how it handled the deposit accounts of the American National Bank?
A. Well, the books of the American National Bank showed their balances, the books showed that they had so many in-

dividual deposits, so many time certificates, so many demand and so many deposits due to banks and bankers, and these accounts were transferred bodily to the books of the Union National Bank.

Q. Do you recollect how long a time that took?

A. How long it took to transfer the accounts?

Q. Yes sir.

A. Well, we went over there Saturday afternoon as soon as we balanced up over at the Union National, and after the American National had balanced up their books, and we worked all during Saturday evening up, I would say until 10 or 11 o'clock and pretty much all day Sunday, and by Monday morning about the opening hour we were in pretty fair shape to open up for business; we had transferred all the individual names to our individual balance book, and the names of the banks and bankers to our banks and bankers, balance book, so it was practically the same as having opened up so many new accounts for the Union National Bank.

Q. Now, when the depositors of the American National commenced to come in what did you do towards adjusting with them?

A. We gave them a new pass book with the name of the Union National Bank and showing that they had so much money on deposit in the Union National Bank.

278 Q. About what proportion in number would you judge continued their accounts?

A. Well, I would think that probably 200 of them continued for sometime.

Q. How many accounts were there in all, do you recollect, about?

A. About very close to 400 individual accounts, and probably eight or ten bank accounts.

Q. What do you mean by bank accounts?

A. Well, accounts of country banks.

Q. What public officers were depositors in the American National Bank that were so transferred?

A. The City Treasurer and the County Treasurer.

Q. You may state if you recollect about how many of the depositors appeared the first day, Monday?

A. Well, I would think that 100 were in there the first day; I know that we were very busy all day long, principally with the depositors of the American National Bank.

Q. Have you quite an accurate idea of about how much money you paid out t them the first day? A. In cash?

Q. Yes sir.

A. No sir, I could not give much idea as to that.

Q. Do you know about how much in the aggregate of money of the American National Bank deposits that were to be paid during December or by the first of the year?

A. Well, the County Treasurer, his money; he was to go out of office, I believe on the 9th of January, so the chances were that the county funds, they would be called upon to pay the county funds in January and I do not know about
279 the city treasurer; and then there were time certificates and demand certificates to be paid shortly after the first of the year.

Q. About how much was paid out in the first thirty days on these accounts?

A. Well, I would think $50,000 to $75,000; that is just on those accounts I have mentioned.

Q. No, altogether?

A. Well, of course, we paid a great deal of money these American National depositors that continued to do business with the Union National, of course, they checked against their accounts.

Q. Well, I am speaking about money, how much?

A. Well, from $50,000 to $75,000, I would think.

Q. The Union National Bank has been in business ever since? A. Yes sir.

Q. And what is the fact as to all the depositors of the American National Bank that were transferred having been paid their money when they wished it?

A. Every depositor of the American National that wished his money from the Union National Bank could get it at any time.

Q. What proportion of them either took their money or took a bank deposit book from the Union National Bank?

A. Well, I would say that three-fourths of them—that either took their money or a book? Well, I would say that three-fourths of them did; there were a great many small balances, I suppose from $1.50 up to $10.00, that were not drawn out as called for for some time.

Q. Then you did not issue pass books for those?
280 A. Not unless they came in and requested that we do so.

Q. Mr. Rainey, I will show you the three promissory notes that have been identified as Exhibits 2, 3, and 4, dated on the 23rd day of December, 1895, and ask you if you recollect the execution of those notes? A. Yes sir.

Q. Now, what books of the American National Bank did you have to inspect to show the [accurancy] of the amounts to arrive at in ascertaining how much money was paid out by the Union National or assumed?

A. We had their daily trial balance book and their individual balance books, and their banks and bankers' balance book.

Q. Those were left with you for inspection? A. Yes sir.

Q. Did you go over those books as book keeper of the Union National Bank?

A. Yes, I went over those balance books, page by page, and footed the various columns and arrived at the grand total.

Q. I will ask you what was taken absolutely by the Union National Bank, if you recollect about the amount?

A. Well, about $37,000 in cash, you mean, and—

Q. I have reference to notes?

A. Well, between $20,000 and $30,000, I do not remember the exact amount, but it was less than $30,000.

Q. Do you remember how much cash the American National Bank had? A. Something like $37,000.

Q. And there was a cash item of $15,000, what was
281 that; in the American National Bank?

A. I don't remember a $15,000 item.

Q. Do you remember what the Bills Payable of the American National Bank were? A. $50,000.

Q. You may explain what those were?

A. One was to the First National Bank of New York, and one to the Minots, and another to the American Exchange National of Chicago, I think, and one to an individual, I do not remember his name.

Q. I will hand you this sheet that you made out, perhaps that might call your attention to it?

A. First National Bank of New York, $18,000; American Exchange National Bank, Chicago $10,000; William Minot, $7,000; M. Shesterger, $15,000; total $50,000.

Q. How soon were those paid?

A. Shall I give the dates.

Q. Yes, if you can.

A. The First National Bank of New York was paid December 26, 1895; American Exchange National Bank of Chicago was paid on the 8th of January, 1896; William Minot paid on the 28th day of December, 1895; M. Shesterger, $15,000 January 10, 1896.

Q. What were those Bills Payable evidenced by?

A. These First National of New York, American Exchange of Chicago, William Minot and M. Shesterger, each one held a note of that amount signed by the American National Bank.

Q. And were those sums due at the time you paid them?

A. Yes sir.

Q. You may state whether or not any of them were
282 past due when you took possession there?

A. No sir; well, I could not state whether any of them were past due or not.

Q. Did you examine the books of the American National Bank at the time that you took possession there to ascertain the condition of all the funds? A. I did not count their cash.

Q. Can you ascertain the fact from your examination of their books at that time whether they had the required cash on hand that the law requires?

Each of the respondents object as incompetent, calling for the conclusion of the witness, for the further reason that the witness has already testified that he did not count the cash.

A. Well, they did not have the required legal reserve.

Each of the respondents moves to strike out the answer as a conclusion.

Q. What amount of cash would be required under the funds as shown on their books?

Each of the respondents object as calling for the conclusion of the witness.

A. Well, they were required to have 25 per cent of their deposits in cash and balances with Reserve Agents.

Q. I am getting your knowledge of the funds from the examination you made of the books, for you to tell as an expert how much the law required they should have on hand?

A. Well, I don't remember the exact figures.

283 Q. Have you any memoranda that you have made from an examination of the books to ascertain whether they had on hand the required amount of cash?

Each of the respondents object as calling for the conclusion of the witness.

A. I have one, but not with me.

Q. Who is the Cashier of the Union National Bank at this time? A. J. W. Thomas.

Q. How long has Mr. Thomas been Cashier?

A. Since about the first of March, 1898.

Q. Do you know his signature? A. Yes sir.

Q. You may examine the endorsement on Exhibit 2, and state in whose handwriting the words "Pay Sumner Wallace or order, without recourse, Union National Bank, by J. W. Thomas, Aug. 8, 1893, its Cashier", you may state in whose handwriting that is?

A. That is in the handwriting of J. W. Thomas, Cashier.

Q. Mr. Rainey, what was done with the physical possession of the assets of the American National Bank that were not taken by the Union National Bank as absolutely theirs?

A. Well, the assets have remained in the possession of the officers of the American National Bank.

Each of the respondents moves to strike out the answer as it states the conclusion of the witness.

Q. Name the party that had possession of these assets first?

Each of the respondents object as calling for the conclusion of [thr] witness.

284 A. Thomas L. Kimball, President of the Bank.
Q. Of what bank?
A. Of the American National Bank.
Q. Do you remember when Mr. Kimball died?
A. I don't remember the exact date.
Q. You remember the fact of his death? A. Yes sir.
Q. You may state what the fact is as to whether or not the Union National Bank has ever had possession of these assets?

Each of the respondents object as calling for the conclusion of the witness, and his opinion.

A. No sir, they have not had possession of them.
Q. You may state what assets of the American National Bank went on to the books of the Union National Bank other than the cash items and the notes that they took absolutely, if any?

Each of the respondents objects as not the best evidence.

A. What other assets?
Q. Yes?
A. Other than those sundry bills receivable that we took?
Q. Yes. A. And besides the cash?
Q. Yes sir.
A. Well, we took the balances that they had with their eastern correspondents, is that what you refer to?
Q. And what else?
A. Nothing besides the cash and the balances with their eastern correspondents, and those sundry bills receivable.
285 Q. Do you know who had charge and attended to the collection of the assets of the American National Bank after this contract was made? A. Yes sir.
Q. You may state who did that?

Each of the respondents object as calling for the conclusion of the witness.

A. Henry F. Wyman attended to it for probably a year and a half.
Q. Who was Henry F. Wyman?

A. He was the Cashier of the American National Bank.
Q. And with whom was he connected in doing this, if anyone? A. Thomas L. Kimball, the President of the Bank.
Q. You say Mr. Wyman was there about how long?
A. I would think a year, to a year and a half.
Q. Where did they have their desks in the bank?
A. In the front part of the office of the Union National Bank.
Q. Was it in the same place that they occupied when they were acting as a bank for the American National Bank, or was it at another place? A. At another place.
Q. Do you know what vault they kept the assets of the American National Bank in? A. Yes sir.
Q. You may explain about the vaults there in that building?
A. Well, we have two vaults there, a money vault and a vault where we keep our books and papers, letter files,
286 etc., and shall I tell where—
Q. You describe the vaults, the question calls for that?
A. Well, the money vault is the south vault, and the book vault is the north vault, and we have a couple of letter files in there, a check file, and a rack for books in use.
Q. Where were the assets of the American National Bank kept? A. In the northwest corner of the book vault.
Q. And where does the Union National Bank keep its assets? A. They are kept in the money vault.
Q. Mr. Rainey, I will call your attention to Exhibit 3, and Exhibit 4, being two of the notes dated December 23, 1895, and ask you whether or not they have been paid?

Each of the respondents object as immaterial under the issues in this case, and no proper foundation laid.

Q. That is, if you know? A. They have not been paid.
Q. And who is the owner of them?
A. The Union National Bank.
Q. Mr. Rainey, I will ask you what this book is which the reporter has identified as Exhibit "26"?
A. That is the record book of the Union National Bank.
Q. What do you mean by record book?
A. A record of the proceedings of the Board of Directors.
Q. I will call your attention to the entry on page 25, commencing on page 25, under date of August 8, 1898, and ending on page 26 with the name of J. W. Thomas, Cas., and ask you whose signature that is?
287 A. That is the signature of J. W. Thomas, Cashier of the Union National Bank.

Complainant introduces in evidence the entry identified by the witness on Page 25 and page 26, being a record of Adjourned Regular Meeting held August 8, 1898, in the office of the Bank, which the reporter may mark Exhibit 27. (A copy of Exhibit 27 is found on page 266 hereof.)

Q. I will call the witness' attention to this book, marked Exhibit 26, Record Book, and will ask you whose signature that is under the following entry, "Minutes Regular Meeting of Board of Directors, held August 2, 1898, in the banking office. No quorum present; meeting adjourned to Monday, August 8, 1898, J. W. Thomas, Cashier", I will ask you whose signature that is?

A. That is the signature of J. W. Thomas, Cashier of the Union National Bank.

Complainant offers in evidence the [—] just read to connect with the other entry, the same being marked Exhibit 28. (A copy of Exhibit 28 is found on page 267 hereof.)

Q. Mr. Rainey, I will ask you, if you are familiar with and known about this Agreement between the American National Bank and the Union National Bank, Exhibit 1?

A. Yes, I am familiar with it and have read it.

Complainant now offers in evidence the contract marked Exhibit 1 (a copy of which is found on page 208 hereof.) And the original on page 205.

288 Complainant also offers in evidence the promissory notes dated December 23, 1895, being Exhibits 2, 3, and 4, copies of which are found on pages 213, 215 and 217, respectively and the originals on pages 212, 214 and 216, respectively.

Q. Mr. Rainey, what amount, if any, if you know, was found due from the American National Bank under this arrangements besides these notes?

A. On the 23rd of December?

Q. Yes, on a few days subsequent was there any cashier's checks or anything, any other? A. O, yes.

Q. Could you tell by looking at this memoranda, does this show what it was?

A. No; that memoranda does not; well, they are included in those items there, those two items.

Q. Well, whatever they were, they were discharged and paid, were they? A. Yes sir.

Q. You may state what the fact is in finding these amounts against the American National Bank under this arrangement what the fact is about Henry Wyman, Cashier, verifying the amounts and seeing they were correct, with you?

A. Well, he and his bookkeepers had gone over those amounts and had balanced up the books before I reached there in the afternoon, and then the books were turned over to me to prove.

Q. What day do you refer to now?

A. That is the 21st of December, 1895, Saturday afternoon.

289 Q. You think that was on Saturday?

A. Yes; at the close of business Saturday afternoon.

Cross-Examination

By Mr. Morsman.

Q. Mr. Rainey, I believe you said or intended to say that there was some liability of the American National Bank assumed by the Union National Bank in excess of these three notes for $67,000 and also in excess of the amount for which the Union National Bank got cash or Bills Receivable as cash; you spoke of it as being cashier's checks, or connected with cashier's checks?

A. Well, I said it was included in those items, the cashier's checks and the certified checks, not the cashier's check and certified checks, but time certificates and demand certificates.

Q. That amount, whatever, it may have been, was not included in these notes of $67,000 each?

A. Yes; those three notes went to make up this.

Q. Then it was included in the three notes of $67,000?

A. Yes sir.

Q. So that $201,000 was ascertained to be the total liabilities assumed by the Union National in excess of the amount which was offset by the cash, cash items and Bills Receivable received as cash by the Union National Bank?

A. I do not know as I understand your question.

Q. (Question read).

A. No sir; I do not remember of making any statement like that.

Q. Well, was it, or was it not the total amount?

290 A. The total amount that the Union National assumed of the American National Bank?

Q. The total amount in excess of the amount the Union National received in cash, cash items, and Bills Receivable taken as cash?

A. No sir; there was nothing in excess of $201,000.

Q. Nothing in excess of $201,000, is that what you say?

A. Well, I can tell you how much the Union National, how many deposits and Bills Payable the Union National received from the American National.

Q. What was he liability as ascertained, assumed by the Union National Bank?

A. The total assumed, $289,097.30.

Q. Now what was the total amount of cash, cash items and bills receivable taken as cash by the Union National Bank?

A. $88,097.30.

Q. The difference being $201,000.? A. Yes sir.

Q. And that difference was covered by the three notes of $67,000 each? A. Yes sir.

Q. On the 21st day of December, 1895, the Union National Bank moved from its former place of business into the offices on and prior to that day occupied by the American National Bank, did it not? A. Yes sir.

Q. And took possession of those offices? A. Yes sir.

Q. And continued to carry on its business there?

A. Yes sir.

Q. And no other banking business was carried on there?

A. No sir.

291 Q. The officers and clerks of the Union National Bank had access to both vaults, did they not? A. Yes sir.

Q. And the Union National Bank kept its books and other papers in what you call the book vault? A. Yes sir.

Q. But its cash and money and Bills Receivable were kept in what you call the money vault? A. Yes sir.

Q. Did it keep its Bills receivable in the money vault?

A. Yes sir.

Q. The money vault was the burglar proof vault, was it?

A. Yes sir.

Q. And the book vault was merely a fire proof vault?

A. Yes sir.

Q. You say that Mr. Henry F. Wyman attended to the collection of the remaining assets of the American National for Mr. Kimball, now do you know whether or not Henry F. Wyman was paid by the Union National Bank for his services?

A. He was not paid by the Union National Bank, no sir.

Q. Can you give any explanation why he was not paid by the Union National Bank under that provision of the contract of December 21, 1895, which required the Union National Bank to liquidate the assets of the American National Bank without expense to the American National?

Complainant objects as calling for the conclusion of the witness, and uncertain.

A. I know of no reason.

Q. When the Union National Bank moved into the offices of the American National Bank and took possession you immediately transferred from the books of the American

292 National Bank all of the deposit accounts showing a balance due the depositor to the books of the Union National Bank? A. Yes sir.

Q. So that, so far as the bookkeeping was concerned the former depositors of the American National Bank then became the depositors of the Union National Bank? A. Yes sir.

Q. And had the same credits standing upon the books of the Union National Bank? A. Yes sir.

Q. Any depositor of the American National Bank who came in and wanted his money got it from the Union National Bank?

A. Yes sir.

Q. But if he was willing to, he simply continued his business with the Union National Bank? A. He did, yes sir.

Q. Checking against the balance transferred from the books of the American National and making deposits in the Union National Bank? A. Yes sir.

Q. Did the City Treasurer check out his balance or continue his account with the Union National Bank?

A. He had an account with the Union National Bank.

Q. Prior to December 21st?

A. Prior to December 21st, 1895, yes sir—transferred to the Union National Bank, and was checked out after the first of the year, I don't know just when.

Q. Entirely, or did the account continue a current account?

A. It continued as a current account.

Q. How was it with the County Treasurer?

293 A. Well, the County Treasurer, H. B. Irey was County Treasurer at the time of the transfer, and he was succeeded by Heimrod about the 9th of January, 1896—these balances were transferred and mostly checked out during January 1896.

Q. By Heimrod? A. By Heimrod, yes sir.

Q. But Heimrod continued to keep a current account with the Union National Bank, did he not? A. For a time.

Q. For how long?

A. Well, I could not tell without referring to the ledger.

Q. Can you approximate it?

A. I noticed that most of the money of the county treasurer was checked out during January 1896.

Q. Yes, but how long did [you] continue to keep a current account with the Union National Bank?

A. Well, I do not remember.

Q. All of your testimony with reference to these matters of amounts, have been made from memory, has it not, and not from the examination of the books during the time you were testifying? A. All of my testimony?

Q. Yes sir.

A. No sir, most of my testimony is from actual figures.

Q. You have not had the books present while you were testifying? A. I had a memoranda.

Q. What memorandum? A. This paper.

Q. The paper now before you? A. Yes sir.

Q. The paper now before you however, does not give
294 any information as to the number of depositors who closed their accounts immediately after December 21st, 1895? A. No sir.

Q. Nor the amount in dollars and cents that depositors of the American National Bank withdrew from the Union National Bank immediately after December 21st, 1895?

A. No sir.

Q. You have no data before you now from which you can give that information? A. No sir.

Q. Of course it was the effort of the Union National Bank, was it not to procure all of the old depositors of the American National Bank to continue their business with the Union National?

A. They would have liked most of them to have continued.

Q. And the most of them, so far as amounts were concerned, did continue, did they not? A. For a time.

Q. But you cannot tell how long? A. No sir.

Q. Was there more than one assignment made by the Union National Bank to the plaintiff Sumner Wallace of the first maturing of the three promissory notes for Sixty-seven Thousand dollars each?

A. I do not know of any other assignment.

Q. You have no knowledge of any other? A. No sir.

Q. What was the aggregate amount of the deposits of the American National Bank, December 21, 1895?

A. $239,097.30.

295 Q. That included open accounts, demand certificates and time certificates? A. Yes sir.

Q. All classes of deposits?

A. Yes sir, all classes of deposits.

Q. And what was the amount of cash resources of the American National Bank at that time?

A. Turned into the Union National Bank?

Q. Well no, what was the amount as shown by the books of the American National Bank?

A. I have not that memoranda here before me. The only memoranda I have is what the Union National Bank took from the American National.

Q. What was the amount received by the Union National Bank from the American National Bank of cash resources?

A. $48,167.79.

Q. That includes currency, gold, silver and all the coin?

A. Yes sir.

Q. Does it also include the balance to the credit of the American National Bank with its different correspondents in other cities? A. Yes sir.

Q. All checks and other cash items?

A. No sir, checks, not cash items.

Q. What do you mean by that?

A. Well, I mean checks, the checks on other banks in the city, or checks on eastern banks, drafts.

Q. That is not included in the $48,000.00?

A. Yes sir, I mean, those checks are included in there but not necessarily cash items; they might have had a cash
296 item in there that we would not have accepted.

Q. Well, did they?

A. Not included in this $48,000.00.

Q. Did they have cash items that were not included in this $48,000.00? A. Yes sir.

Q. What were they?

A. Well, I know of one certificate of deposit, of $5,000.

Q. What was that?

A. That was issued by the Union National Bank.

Q. To whom? A. To John L. McCague.

Q. And held by the American National?

A. Held by the American National, yes sir.

Q. And endorsed by John L. McCague? A. Yes sir.

Q. And did the Union National refuse to receive that as cash from the American National Bank under this agreement of December 21, 1895?

A. I know they did not take it.

Q. At any time?

A. They did not take it at this time.

Q. Did they afterwards?

A. It was in litigation at the time.

Q. No, but did they afterwards take it, the Union National?

A. Yes, I believe that in after years it was turned in.

Q. They took it and paid it?

A. It was paid I believe on a compromise of some kind.
297 Q. Paid by the Union National? A. Yes sir.

Q. It was an ordinary certificate of deposit showing that John L. McCague had deposited $5,000 in the Union National Bank, was it not?

A. Well, from the face of it you would have thought it was an ordinary certificate of deposit.

Q. Well, that is what it purported to be on its face?

A. Yes sir.

Q. And John L. McCague had transferred it to the American National Bank? A. Yes sir.

Q. Now what other cash item was there held by the American National Bank to your knowledge at that time?

A. I have no knowledge of any.

Q. And what did you give the amount of the deposits of the American National? A. $239,097.30.

Q. Mr. Rainey, you may examine the records of the proceedings of a Special Meeting of the Board of Directors of the Union National Bank found in this record Book on page 23, and state whose signature is affixed to the record, it commences on page 23 and continues on Page 24?

A. The signature of J. W. Thomas, Cashier of the Union National Bank.

The respondents offer in evidence as part of the cross-examination of the witness the record of the Special Meeting of the Board of Directors of the Union National Bank, on April 21, 1898 and commencing on Page 23 and continuing on
298 Page 24 of the record of such proceedings and marked Exhibit 29. (A copy of Exhibit 29 is found on page 268 hereof).

Complainant objects to the offer of Exhibit 29 as not proper cross-examination.

Redirect Examination

By Mr. Macomber.

Q. Mr. Rainey, referring to this Exhibit 29, that has just been offered by the defendant, you remember the fact of it having been tried to get the stockholders of the American National Bank to go into an arrangement to save the assets of the Bank? A. Yes sir.

Q. You know whether that was carried out or whether it failed? A. Well, it was not carried out very fully.

Q. Were the other two notes there ever assigned to Mr. Wallace? A. No sir.

Q. Now you spoke about these $50,000 of Bills Receivable, how soon after December 21st, 1895 was that paid?

A. Bills Payable of the American National Bank?

Q. Yes you gave that once. About what portion of the deposit were paid the first thirty days?

A. Well, I would think they paid $100,000.00.

Q. Of just the deposits or including the Bills Receivable?

A. Of the deposits.

Q. Then all together on account of the liabilities of the American National Bank, how much was paid, how much the first thirty days? A. Well, that would be $150.000.00.

299 Recross-Examination

By Mr. Morsman.

Q. You are speaking from memory, are you not, as to the amount of deposits paid in the first thirty days? A. Yes sir.

Q. You said in your examination in chief, that the amount paid in the first thirty days was from $50,000 to $75,000, why do you now change it to a $100,000.00?

A. Well, I may have thought it was a little more than Seventy-five thousand dollars.

Q. You do now think it was more than $75,000?

A. I am merely testifying from my memory.

Q. Is it memory or are you guessing?

A. Well, I never made a list of the amounts paid.

Q. And in making this guess or estimate that you now give, that it was $100,000.00, you include all sums paid out to depositors do you not? A. Yes sir.

Q. And that would include the sums paid out to depositors who continued their accounts with the Union National Bank as current accounts?

A. I would mean by that that $100,000 of the deposits transferred by the American National Bank to the Union National Bank had been paid out.

Q. Yes, but you include in that the amount paid to depositors who continued a current account with the Union National Bank, do you not?

A. Yes that would include a portion of them?

Q. And those same depositors would be putting money back into the Union National Bank, while they were taking out, would they not? A. Those that continued, yes sir.

300 Q. You stated that this arrangement provided for by the Resolution of the Board of Directors which has been introduced in evidence and marked Exhibit 29, being the record of the proceedings of a Special Meeting of the Board held April 21st, 1898, was not very fully carried out, what do you mean by saying it was not very fully carried out?

[Q.] That all the stockholders of the American National Bank did not pay in.

Q. But some of them did pay in? A. About two of them.

Q. Do you know who they were?

A. I know who one of them was.

Q. Who was he?

A. The stock held by the American Building Company, I believe.

Q. The National Bank Building Company?

A. Yes, the National Bank Building Company.

Q. That was paid in was it? A. Yes sir.

Q. That National Bank Building Company owns the building that the Union National Bank moved into December 21, 1895, and still occupies? A. I believe they own it.

Q. And how much did the National Bank Building Company pay in pursuant to this resolution of the Board of Directors of April 31, 1988?

A. My recollection is it was $60,000.00.
Q. $61,500?
A. Something like $60,000 is as near as I can remember.

301 Q. And what did the Union National Bank give to the National Bank Building Company in writing, if you know, upon receipt of that $61,500?
A. I don't know of anything.
Q. You do not know of anything? A. No sir.
Q. Aside from this resolution of the Board of Directors of April 21, 1898, you do not know of anything more than that?
A. No sir, I do not.

HENRY E. RAINEY.

The further taking of testimony under the annexed [—] is adjourned until tomorrow morning, October 31st, 190[illegible], at ten o'clock.

302 Omaha, October 31st, 1901, 10 o'clock A. M. The further taking of testimony is resumed pursuant to adjournment. The same parties being present as on yesterday.

Henry F. Wyman, recalled by complainant.

Direct Examination

By Mr. McCulloch.
Q. You may state Mr. Wyman, what the amount of capital stock of the American National Bank was?
A. $200,000 [dollars].
Q. Divided into how many shares?
A. Two thousand shares of $100 each.
Q. Was that always the capital stock of the Bank from the time it was organized until the liquidation took place?
A. Yes sir.

HENRY F. WYMAN.

Filed Dec. 30, 1901. Geo. H. Thummel, Clerk.

303 James Burness, of lawful age, being first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Direct Examination

By Mr. McCulloch.
Q. You may state your name, age and place of residence?
A. James Burness, age 43, residence, Omaha, Nebraska.
Q. How long have you lived in Omaha?
A. About eighteen years.
Q. How long were you acquainted with Mr. Thomas L. Kimball in his life time? A. About eighteen years.

Q. Do you remember the date of his death? A. I do.
Q. You may state the date of it? A. October 8, 1899.
Q. You may state what relation, as an employee of Mr. Kimball you were? A. I was his secretary.
Q. For how long? A. Well for about 16 years.
Q. What were your duties as such secretary?
A. Well to attend to all his business, private and otherwise.
Q. What position do you hold now, in reference to the assets of the American National Bank?

Each of the respondents object as calling for the conclusion of the witness.

A. I am Trustee of the assets.
304 Q. What positions and what was the general business that Mr. Kimball was in, while you were Secretary for him? A. Previous to his banking experience?
Q. Just generally during the time you were his Secretary?
A. He was Assistant General Manager, Traffic Manager, Third Vice President, Acting General Manager, General Manager, Asst. to the President of the Union Pacific Railway, President of the Depot Company, and afterwards President of the American National Bank and Agent or Trustee of the American National Bank.
Q. Do you remember the incident of the American National Bank going out of business and Mr. Kimball having something to do with their assets as Trustee? A. In a general way.
Q. When at all, did you first have anything to do with these assets? A. In the spring of 1897.
Q. Do you remember the date? A. No I do not exactly.
Q. Do you remember the fact of Mr. Henry F. Wyman acting there as Assistant to Mr. Kimball? A. I do.
Q. You may state when you commenced in reference to Mr. Wyman quitting?
A. As far as I remember I think it was in April 1897, but of that I am not exactly sure.
Q. Well had Mr. Wyman quit the place?
A. I think he had, yes sir.
Q. What were your general duties after you became connected with the assets, as Assistant to Mr. Kimball?
305 A. In looking after the assets and trying to collect them under his direction.
Q. How much of your time was devoted to that?
A. Nearly all of my time.
Q. And how long did that continue?
A. From that time until the time of his death.
Q. And then were you appointed by the court?

A. About two months afterwards.

Q. Have you a list of those assets that Mr. Kimball held at his death? A. I have.

Q. Have you it with you? A. I have.

Q. Will you let me see— (Hands paper to counsel)

Q. When you first became connected as bookkeeper or assistant to Mr. Kimball, in connection with these assets, where were the assets kept, I mean the assets of the American National Bank? A. They were kept in the vault.

Q. Which vault? A. In the north vault.

Q. The north vault of what?

A. The north vault of the Union National Bank, and in the case got up by Mr. Wyman just for that purpose, the keeping of those assets, under lock and key.

Q. Who had the physical possession of these assets?

Each of the respondents objects as calling for the conclusion of the witness.

A. Mr. Kimball.

Q. And you may state in what manner he had this physical possession of them, just explain how the assets were kept?

306 A. They were kept in a case in that vault, in such shape that they could be got at easily, that is by Mr. Kimball or myself and nobody else.

Q. Were they under lock? A. They were, yes sir.

Q. You may state if they had any connection as to location or situation with the assets of the Union National Bank?

Each of the respondents object as calling for the conclusion of the witness.

A. Well, I suppose they were pretty close to the assets of the Union National, but although they were in the same vault, they did not seem to belong to them.

Q. Well were they in the same vault?

A. I don't know whether they were or not, I don't know whether the Union National kept their assets there or not.

Q. Was this the vault in which the Union National keeps its cash? A. No sir.

Q. You may state the facts, as to the officers of the Union National having any control over your [handlinging] and getting the assets for examination?

Each of the respondents object as calling for a conclusion of the witness and being a conclusion.

A. No I think not.

Q. I will hand you the list which purports to be dated Omaha, October 8th, 1899, as a statement of the condition of the American National Bank of Omaha, from the commencement of liquidation to date, which I will have the reporter mark as Exhibit 30 and ask you what that is?

307 A. It is a statement of the condition of the Bank at that date, October 8th, 1899.

Q. Under whom? A. Under Mr. Kimball.

Q. Who made this statement? A. I did.

Q. From what did you make it?

A. From the records in my possession, books and papers.

Q. What do you say as to this being correct?

A. Well, I think it is correct, but it has been two years since I made it up, but I rather think it is correct.

By Mr. Morsman:

Q. Do you say it was made two years ago?

A. Two years ago, or nearly two years ago, shortly after Mr. Kimball's death.

Mr. Macomber:

Q. Well, to be specific in the matter, what does this statement purport to be as to the period of time that these assets cover, I call your attention to the statement of the paper "State of the condition of the American National Bank of Omaha, from the commencement of liquidation to date". Now does this contain a list of the assets as held by Mr. Kimball when he became Trustee under the contract, if you know?

A. No it does not contain a list of assets that he took hold of at the time of the commencement of liquidation, for the reason that quite a number of those assets had been liquidated but money or other collateral that may have been taken in lieu of those would appear in that statement, either taken as collections or otherwise.

Q. Then [in] contains a statement of the assets that

308 he took at that time as trustee with such changes as his collections would show? A. Yes sir.

Q. You may state to the reporter the number or pages or number of sheets in this statement? A. Six.

Q. And it is typewriting, is it? A. Yes sir.

Q. The reporter may place Exhibit 30 upon each page. Mr. Burness, calling your attention to the first sheet of this Exhibit 30 you may state what that contains?

A. Well, you might call it a balance sheet, showing the liabilities and resources.

Q. Then it is true, is it not, that the head of each page following, shows the nature of the list below? A. Yes sir.

Q. Page two of this Exhibit contains, does it at the head "Loans and Discount"? A. Yes sir.

Q. Then follows a list of Loans & Discounts? A. Yes sir.
Q. Then the next page, what is the meaning of "L & D No. 2"? A. It means a continuation of the Loans & Discount.
Q. The L & D is for Loans & Discounts? A. Yes sir.
Q. And page 4, what does the L & D mean?
A. Loans & Discounts, a continuation of the previous pages.
Q. Then the 5th page at the head contains a statement of stocks, securities, claims, etc., does it? A. Yes sir.
309 Q. And the last page does not appear to be headed, is that Real Estate?
A. That is Real Estate, yes sir.
Q. O yes, it is headed Real Estate. Mr. Burness what is the meaning of this 1st page of this Exhibit 30 under the word "Expenditures", does that mean that those are the amounts that Mr. Kimball has paid out? A. Yes sir.
Q. I will ask you the first entry under the word "Expenditure" which reads as follows: "Liabilities prior to liquidation $22,799.90, what is the meaning of that?
A. That is an item that I don't know very much about, I think Mr. Wyman knows more about it than I do, but if I recollect correctly, it was some item of Bills Receivable of the American National Bank that was given to the Union National Bank and that was still an indebtedness of about $22,000 due them which was afterwards paid. It was handled in some way by a Cashier's check.

By Mr. Morsman:
Q. What do you mean by "due them"? Due the Union National?
A. Due the Union National on account of those Bills; I think the original amount was about $39,000.

Mr. Macomber:
Q. If it was of that nature would it be under "Liabilities prior to liquidation", does that not mean the debt accrued prior?
A. I took that phraseology from a statement of Mr. Wyman's.
Q. But in any event that indicates an amount that
310 Mr. Kimball paid out? A. Yes sir.

The complainant will now offer in evidence Exhibit 30, being the statement of the condition of the American National Bank of Omaha, from the commencement of liquidation to its date. Copy on page 270.

Each of the respondents objects as incompetent, not the best evidence.

Q. Mr. Burness, I will ask you where these assets were between the death of Mr. Kimball on the 8th day of October, 1899, and your appointment as trustee by the court to succeed him?

A. They were in the same place as they were before under my charge.

Q. Have you a statement of the affairs of your trusteeship with you? A. No; I have not.

Q. Have you filed any with the court? A. I have not.

The further taking of testimony under the annexed notice is adjourned until to-morrow morning, Nov. 1, 1901, at 10 o'clock.

Omaha, Nov. 1, 1901. 10:00 A. M.

The further taking of testimony under the annexed notice is resumed pursuant to adjournment the same parties being present as on yesterday, the direct examination of James Burness being continued by Mr. Macomber as follows:

311 Q. Mr. Burness, since you have testified yesterday have you made some additional statements, drawn off some additional statements of the condition of the affairs of the American National Bank? A. Yes sir.

Q. The reporter will mark this as Exhibit 31, which purports to be a statement, Supplemental statement of the condition of The American National Bank, of Omaha, from October 8th, 1899, to and including January 7th, 1900. I will ask you to examine that Exhibit 31, and state what it is?

A. It is a statement of the condition of The American National Bank from October 8, the date of Mr. Kimball's death, to January 7, the day previous to my becoming trustee.

Q. Who did the business or affairs that are stated on this paper? A. I did.

The complainant will offer to introduce Exhibit 31 in evidence. Copy on page [—]

Mr. Morsman:

Q. Mr. Burness, this statement you have produced and marked Exhibit 31, purports to cover transactions between the date of Mr. Kimball's death and the date of your appointment as trustee? A. Yes sir.

Q. And from what source did you get your information to make this supplemental statement, marked Exhibit 31?

A. From the books of the American National Bank.

312 Q. Now, when you speak of it as a statement of the condition of the American National Bank, do you mean it is simply a statement of the condition of the assets which

were turned over to the Union National Bank and which Mr. Kimball was engaged in liquidating?

Complainant objects as the question assumes something not proven, something which the witness has not testified.

A. Well, they were the assets of the American National Bank, but they had not been turned over to the Union National Bank.

Q. How do you know they had not been turned over to the Union National Bank?

A. Well, I know so far as my own knowledge is concerned or since I had charge of them that the Union National never had possession of them.

Q. Well, you mean it is a statement of the condition of the assets or funds which the American National Bank turned over under the contract between the American National Bank and the Union National Bank of December 21, 1895, and which Mr. Kimball had been engaged in liquidating? A. Yes sir.

Q. Now, who made the collections and expenditures or disbursements during the period between October 8, 1899, to and including January 7, 1900?

A. I did; that is, if there are any disbursements there. I do not think, though, there was anything paid out, there may have been, I don't think so, but any collections that were made were made by me personally.

Q. After Mr. Kimball's death and before you were
313 appointed trustee? A. Yes sir.

Q. Why did you do it?

A. Well, I don't know; I don't know by what authority I did it; I had been there previously and simply kept along.

Q. Were you an employe of the Union National Bank?

A. No sir.

Q. You were not? A. No sir.

Q. You say you do not know whether there were any disbursements or not during that period?

A. I don't know whether there were or not; this statement will show.

Q. There are items here under "Total Expenditures as per statement of October 8, 1899, $117,352.77," following that "Since above date to January 8, 1900, on account of real estate, taxes, $77.07", that was disbursement?

A. That would be disbursement or it may have been a matter of bookkeeping; I don't know whether there was any cash paid out for that or simply a matter of book keeping.

Q. You don't know whether there was any cash paid out?

A. I do not know now personally without examining the record.

Q. You are not prepared to say that cash was paid out?
A. I am not prepared to say that was cash paid out.
Q. Another item, "Salaries, $241.93" was that an actual disbursement?
A. That was an actual disbursement, yes sir.
Q. Who made the disbursement?
A. I did after I was appointed trustee.
314 Q. After you was appointed?
A. When I was appointed, I suppose I collected salary between those dates.
Q. To whom did you pay it? A. To myself.
Q. For what services?
A. For services performed between October 8th and January 7th.
Q. Can you explain why you charged this sum of $241.93 on account of salaries paid to yourself to the fund which you had charge of as Trustee instead of charging it up to and requiring it to be paid by the Union National Bank under the contract of December 21, 1895?
A. No; I cannot, I was simply following the precedent that had been established before.

Mr. McCulloch: Q. By whom?
A. [My] Mr. Kimball and Mr. Wyman.

Mr. Morsman: Q. Can you explain why they adopted that practice?

Complainant objects as wholly immaterial unless you are cross-examining as to his competency.
Mr. Morsman. That is what I am doing.

A. No sir.
Q. Had you any instructions from any source with reference to that? A. No sir.

Respondents object as to the introduction of Exhibit 31, being the paper dated January 8, 1900, and entitled Supplemental Statement of the condition of the American Na-
315 tional Bank, of Omaha, from October 8th, 1899, to and including January 7th, 1900, on the ground that it is incompetent and not the best evidence.

Mr. Macomber: Q. Mr. Burness, I will now hand you another paper, marked Exhibit 32, which purports to be a statement of collections and expenditures made by James Burness, Trustee, of the American National Bank, since the date of his appointment (January 8th, 1900) to and including October 31st, 1901, which Exhibit I will hand to you and ask you to state what that is?

A. It is a statement of the collections and expenditures made by me as trustee of the American National Bank since the date of my appointment to and including October 31, 1901.

Q. Since your appointment in this case? A. Yes sir.

Q. What was the date of your appointment?

A. January 8, 1900.

Q. From what did you make this? A. From the records.

Q. And is this a true statement so far as it shows?

A. Yes sir.

Complainant offers in evidence Exhibit 32.

Each of the respondents object to the offer of Exhibit 32, entitled "Statement of Collections and Expenditures made by James Burness, Trustee, of the American National Bank, since the date of his appointment, (January 8th, 1900, to and including October 31st, 1901)" on the ground that it is incompetent and not the best evidence. Copy of Ex. 32 on page 277.

316 Q. Mr. Burness, calling your attention to Exhibit 31, to this entry, "Total Liabilities, January 7, 1900, $367,765.00", what is that?

A. I think that is made up of the capital stock of the American National Bank and the indebtedness to the Union National Bank.

Q. Then what is the total resources made out of, being the same amount?

A. Promissory notes, real estate, and I think that was practically all; I think the stock securities, judgments and claims, etc., the amounts would be charged up to profit and loss as shown by the books.

Q. Then in this same statement I will ask you to explain what you mean by Loans and Discounts, $239.00?

A. It means that $239.00 have been collected from the notes held by me.

Q. And the next entry "Interest & Discounts, $168.85"?

A. That probably is interest collected.

Q. And "Real estate, rents, $734.68"?

A. Rents collected from real estate.

Q. How come you to have rents paid, what did that arise from?

A. There is some property that we were getting rents from, and I suppose that is how it came there; I do not remember now the particular transaction.

Q. Now, this matter of salaries in this statement, of $241.93, is an entry of the amount that you claim to be due you from the death of Mr. Kimball, was it, up to your appointment? A. Up to my appointment, yes sir.

Q. What did you do during that interval towards taking care of the assets?

317 A. Well, I [look] after them and tried to collect what I could, I had the care of them.

Q. You may state who had the actual manual possession of these assets during the interval from the death of Mr. Kimball until your appointment?

Each of the respondents objects as calling for the conclusion of the witness.

A. I did.

Q. And where were they kept during that interval?

A. In the same place as they had been kept before.

Q. By whom? A. By Mr. Kimball.

Q. Mr. Burness, now passing from that statement to the next statement which was marked Exhibit 32, which purports to be the statement that you made of your doings since your appointment, I will call your attention to the entry, "Loans and discounts, $22,284.17", and ask you to explain that item, how that is made up?

Each of the respondents objects as incompetent and not the best evidence.

A. It is made up of part cash collected from the notes held and the balance charged off to profit and loss.

Q. You may explain how that is made up, from what it is made up?

Each of the respondents objects as incompetent and not the best evidence.

Q. That is, your method by which you would arrive at that amount, just give your method of your collections and what your entries would be and under what heads?

Each of the respondents objects as incompetent and not the best evidence.

318 A. A great many of the notes that were held were compromised, and the best settlement made with the parties that I thought possible to be made; now, it may be that part cash was paid for the notes and the balance charged to [prifit] & Loss. The face of the note would be credited to loans and discounts, and then on the other entry the cash would be credited up and the balance would be charged to profit and loss so that entry there in loans and discounts amounts to the face of the notes, but it does not show actual cash having been collected for them; there is quite a number of compromises and settlements made with different parties that were going to

take advantage of the bankrupt law and could not pay and would not pay, and we thought it was best to take what we could get out of them. I think that was done by the order of the court in most instances.

Q. Will this statement show the amount of cash that you received from that item?

A. From the loans and discounts?

Q. Yes sir.

A. No; it would not; it would show what the total amount of the collections have been, or adjustments, and the disbursements. By checking the books you could find out; in settling the note that way, of course it is a matter of book keeping.

Q. Is there any statement in this exhibit that shows the actual cash that has been collected during the period covered by this? A. No sir; not actual cash.

Q. But what is the fact about the items showing payments by you and the amount of cash on hand, showing the actual cash that was handled?

319 Each of the respondents object as incompetent, and not the best evidence.

A. The items in disbursements, a good many of them of course, would be cash paid out, but a great many of the others would simply be debit and credit, and the cash on hand, I have got that in the Union National, or at least I think it is, according to the balance book.

Q. How much cash on hand have you at the present time?

A. I think about $3900 if I remember.

Q. Will this statement show? A. Yes sir.

Q. Please indicate to us where it would show?

A. It shows there, $3977.72.

Q. That is the entry, cash on hand, October 31, 1901?

A. Yes sir.

Q. How much cash was on hand at the time you took possession as trustee?

A. In the neighborhood I think, of $3,000.

Q. Will this statement show? A. Yes, $3,041.83.

Q. How much cash have you paid on the three notes?

A. $19,000.

Q. You may state, Mr. Burness, the fact as to whether the the $19,000 paid on the notes and the $3977.72 represented all the cash that has come into your hands except such as you have paid out on expense and expenditures, etc.?

Each of the respondents object as incompetent, not the best evidence, calling for the conclusion of the witness.

320 A. Yes sir.

Cross-Examination

By Mr. Morsman:

Q. In this statement marked Exhibit "30", bearing date October 8, 1899, entitled "Statement of the condition of the American National Bank, of Omaha, from the commencement of liquidation to date", containing six pages, that you say, was made up by you from the books and papers which you found after Mr. Kimball's death? A. Yes sir.

Q. And it was intended by you to cover his transactions while he was engaged in liquidating the assets of the American National Bank? A. Yes sir.

Q. Now, I wish you would give us the items showing how you obtained the item under the heading of Expenditures, called "Liabilities prior to liquidation, "$22,799.90", give us the items?

A. I do not believe I have got those items here. That item was taken from a statement that Mr. Wyman had made and I presume it was correct.

Q. But you do not know whether it was correct?

A. I do not.

Q. You did not verify the statement?

A. I did not verify that part of the statement.

Q. To whom did you make the statement?

A. Mr. Wyman.

Q. Was it simply a paper you found among the assets and you do not know anything about the correctness of it?

A. I do not know anything about the correctness of it nor how that amount was arrived at.

321 Q. Do you know anything about the items composing the item under the heading of Expenditures on the first page of this Exhibit, called "Expenses prior to liquidation, $4,985.99"? A. No sir.

Q. Where did you obtain your information from which you made that item, $4,985.99?

A. From a statement Mr. Wyman made previously.

Q. Are you in possession of the statement made by Mr. Wyman covering that item? A. No sir.

Q. What did you do with it?

A. It is with the records over there at the bank.

Q. When you say it is not in your possession you mean you have not it here? A. I have not it here.

Q. Was that statement from which you obtained the item "Liabilities prior to liquidation, $22,799.90"? A. Yes sir.

Q. Then you have that statement?

A. I have not it here; I think it must be in the bank.

Q. And you say you do not know anything about the correctness of it?

A. I do not know anything about the correctness of it, of course.

Q. From what source did you obtain the facts in this statement, Exhibit "30" found on page one, under the heading of Expenditures, and called "Expenses, Salaries, $4,669.96"?

A. That I think would be taken from the books, I suppose.

322 Q. But did you take it from the books?

A. I rather think I did. I do not know whether I took it all from the books or part from Mr. Wyman's statement, and from the time I commenced and from that time on.

Q. Do you understand and mean to be understood as making this statement to show that item of $4,639.96 as having been expended on account of salaries in the liquidation of the assets by Mr. Kimball? A. I rather think so.

Q. Can you give an explanation why that was not paid by the Union National Bank under the contract between that Bank and the American National Bank? A. No sir.

Q. What is the item of attorneys' fees, $2,114.93, on page one of this Exhibit 30, composed of?

A. I suppose it was fees paid to atorneys for conducting different cases.

Q. Do you know anything about it?

A. I may know about part of it, but I question if I know about it all.

Q. Do you know to whom it was paid, for what services?

A. No sir.

Q. The item under the same heading on the same page, "Court Costs, $678.04", what is that composed of?

A. It is composed of costs paid in cases that were in litigation.

Q. How do you know that? A. From the books.

Q. You have no personal knowledge about it?

A. Excepting in part.

323 Q. What part have you knowledge of?

A. I have knowledge from the time I commenced with Mr. Kimball, in 1897, down to that date.

Q. From the time you were employed by Mr. Kimball?

A. In the bank, yes sir.

Q. Were you employed by Mr. Kimball to assist him in the liquidation of the assets, or by the bank?

A. By Mr. Kimball.

Q. And you were not employed by the Union National Bank at all? A. No sir.

Q. What were you doing after you were employed by Mr. Kimball, anything at all but assisting in liquidating these assets?

A. That was all, and attending to some of his private business.

Q. Then the item of Expenses, Salaries, $4,639.96, includes your salary for serving him in liquidating these assets?

A. Yes sir, in part.

Q. And you suppose it also to include salaries paid by him to other persons, do you, for assisting him in liquidating the assets? A. Yes sir.

Q. So that whole sum of $4,639.96 paid on account of salaries you understand to be a sum paid by him for assistance in liquidating the assets? A. Yes sir.

Q. Well, now what is the item on the same page of Exhibit 30, called "Advertising, printing and postage, $544.17" composed of?

324 A. Advertising the meetings, and I think it was advertising some chattels the bank had, and the general conduct of its business.

Q. Which bank had? A. The American National.

Q. And you mean chattels that were turned over by the American National Bank under the contract of December 21, 1895?

A. By some parties that were indebted to the bank.

Q. Turned over to Mr. Kimball?

A. Turned over to Mr. Kimball, that of course, I could not say without verifying the books to see just what it was composed of.

Q. And the item of "Sundries, $89.98", what do you mean by sundries there?

A. Well I suppose that is charged to an account that we could not get it in any place else; I do not know what it was composed of; it may be recording deeds, I do not know just what it is composed of.

Q. You mean it was sundry expenses incurred by Mr. Kimball in the liquidation of these assets? A. Yes sir.

Q. So far as you know, then, from the time that Mr. Kimball commenced the liquidation of these assets, all expenses incurred were charged against the assets or the fund?

A. Yes sir.

Q. Now, passing to the statement marked Exhibit 31, dated January 8, 1900, the item of salaries in that statement, $241.93, I believe you say is to cover your salary during the period from October 9, 1899, the date of Mr. Kimball's death, to and including January 7, 1900, when you were appointed trustee?

A. Yes sir.

325 Q. During that time you collected the sum of $1,142.53 did you?

A. Whatever the statement shows there; it may, of course be some book keeping in connection with it. Yes, that is right.

Q. That is the total amount collected? A. Yes sir.

Q. And what other service did you perform during that time?

A. I do not know that I performed any other service than try to collect assets.

Q. At what rate per month is your salary computed?

A. $75,00.

Q. $75.00 per month? A. Yes sir.

Q. What else were you doing during that period?

A. Just attending to the assets that were held by Mr. Kimball.

Q. And nothing else? A. Nothing else, no sir.

Q. Not attending to Mr. Kimball's private business or relating to his estate? A. Very little during that time.

Q. During the time preceding his death what rate was your salary charged against this fund? A. $50 a month.

Q. And is that the whole salary you were receiving?

A. No sir.

Q. You were receiving other salary from him?

A. Yes sir.

326 Q. Well, why was your salary charged at $75. per month during the period after his death and before you were appointed trustee?

A. I don't know, I think probably I thought it was worth it.

Q. You thought it was worth it? A. Yes sir.

Q. And you fixed your own salary? A. Yes sir.

Q. And charged against this fund? A. Yes sir.

Q. Did you have any consultation with anybody about it at all? A. No sir.

Q. Well you understood that you did not have any authority at all after Mr. Kimball's death, did you not?

A. Yes sir.

Q. Now, turning to statement marked Exhibit 32, and purporting to be a statement of your own transactions from January 8, 1900, to and including October 31, 1901, why did you [you] bring that statement down to the present date?

A. I think it is down to the present date, October 31st.

Q. O, yes, it includes that. Explain the item under the head of "Collections" in this statement marked Exhibit 32, called "Loans & Discounts, $22,284.17", you say that was not all cash?

A. No sir, that is, it was not all collected in cash that would be the face of the notes.

Q. Then you credited as collected the face amount of the notes which you disposed of? A. Yes sir.

327 Q. Whether you collected the whole amount or not?

A. Yes sir.

Q. And you charged as disbursements or expenditures the amount that you disbursed in cash and charged to profit and loss the amount of the notes lost in compromise or settlement?

A. Yes sir.

Q. Did you charge to profit and loss any notes upon which nothing was collected? A. Yes sir.

Q. What amount of those notes?

A. Well, you would have to figure them out; you can't tell from that.

Q. You can explain in a general way what they were?

A. Those notes, the parties who had taken advantage of the bankrupt act—of course the notes were no good and we took them out of the loans and discounts account and put them in the Profit and Loss, and the loans and discount account would have to get credit for that much.

Q. The item of "Interest and Discounts, $3,728.73" under the head of collections, that was received in cash, was it?

A. No sir; there was a large part of that—I think a Curtis note, S. S. Curtis, and Sackett, which was held in the Loans and Discounts but which was afterwards taken out and a judgment secured against them and the interest was added up and the interest credited to the interest account, and the notes credited to loans and discounts, and afterwards put in the judgment account, or stocks, securities and claims, etc., as they call it—simply taken out of one account and put in another, and the interest that was figured up to get the judgment was credited to the interest and discounts.

Q. This statement marked Exhibit 32 under the heading of collections, total, $57,814.06, does not show in fact the
328 collections actually made at all?

A. That is in cash, no sir; it does according to the books or the adjustment of the accounts, you might call it.

Q. But where you charged a note off of the accounts entirely or out of your Loans and Discounts account you carried it into this statement under the head of collections?

A. Yes; that is the way it was done.

Q. The item of "Real Estate, account rents", under the head of collections, "$971.25" was that all cash?

A. That was all cash.

Q. And "Real Estate, act. sales, $10,980.47", was that all cash? A. That was all cash.

Q. And "Real Estate, act. taxes rebated, $138.53" was that all cash? A. That was all cash, yes sir.

Q. "Stocks, securities, claims, etc., $15,669.08", was that cash? A. Very little of that was cash.

Q. Then as a matter of fact, instead of collecting that sum on account of stocks, securities, claims &c., you merely charged it out of the accounts as if it was a loss?

A. Yes; it is a loss in fact, most of it, I think.

Q. What does this item mean, "Received on account of 10 shares of stock of American National Bank, held by the late Thomas L. Kimball, $1,000"?

A. That is $1,000 I got for that liability.

Q. Then you collected from the estate of Mr. Kimball $1,000 on account of his supposed stockholders' liability as a stockholder in the American National Bank?

329 A. Well, I do not remember where I got that check, whether I got it from Mr. Kimball or who.

Q. Did you receive it in cash? A. I think I did.

Q. Do you know whether you did or not?

A. By examining the books I would, but now I don't remember.

Q. What did you do with it, when you got it?

A. I think I paid it to the Union National.

Q. You paid it to the Union National Bank? A. Yes sir.

Q. Who gave you the check? A. I do not remember.

Q. To what person did you pay it in paying it to the Union National Bank?

A. I either paid it to Mr. Thomas or Mr. Wattles, I do not remember which.

Q. When did you pay it to the Union National Bank?

A. I have not got the date, just what date it was; it was about the same time it was received.

Q. The same time that you received it?

A. About the same time I received it.

Q. On which of the three notes did you have it credited?

A. Well, I do not remember that either.

Q. Did you have it credited on either of the three notes?

A. Yes sir. I think it was credited on one of the three notes or it may have been divided up.

Q. Can you tell by examining the notes?

A. I think so.

330 Q. You may look at these notes and see if you can tell?

A. I do not know whether it is on either one of those notes.

Q. You mean you do not know whether it is credited on either one of the notes? A. No sir.

Q. You are examining the notes now, are you?

A. Yes sir.

Q. And you cannot find any credit of that sum of $1,000 on either or all of the three notes?

A. Not from the endorsement on the back.

Q. Did you receive the check for that $1,000 from Mr. Kimball as Executor or administrator?

A. I do not know from whom I received it.

Q. Whose check was it? A. That I cannot remember.

Q. Where did you receive it? A. In the bank.
Q. And you cannot remember the date of it?
A. I think it was sometime in the early part of 1900; now, I don't remember the date, no sir.
Q. Can you tell from any books or records you have whose check it was? A. No sir.
Q. Or who handed it to you? A. No sir.
Q. Did you say it was paid by Mr. Kimball's estate?
A. No sir.
Q. Do you know who did pay it?
A. I do not remember now who paid it.
331 Q. Do not you know, Mr. Burness, that it was a mere rebate by the Union National to Mr. Kimball's estate? A. I do not.
Q. Have you any means of ascertaining by whom the check was drawn?
A. I do not know whether I have or not; I do not know whether I could trace it down; I probably could, but personally I do not remember.
Q. You are familiar with the books of the Union National Bank, are you not? A. No sir.
Q. You do not have anything to do with them?
A. Not with the books, no sir.
Q. You perform clerical duties there, do you not.
A. Yes sir.
Q. What kind of duties?
A. Draft clerk, you might call it.
Q. How long have you been doing that?
A. About two months I should think.
Q. Not longer than that?
A. May be three. Now and again, sometimes the boys get a lay off, sick or off on a vacation, and I help them out.
Q. What kind of clerical work did you perform prior to three months ago? A. The same.
Q. I understood you to say you had not been doing that kind of clerical work more than about three months, how long have you been performing clerical work in the Union National Bank?
A. Well, at different times, but not very long; this
332 is the longest time that I have been doing it, that is now.
Q. But at different times since Mr. Kimball employed you, you have been performing clerical work for the Union National Bank? A. Yes sir.
Q. And who paid you for those services?
A. The American National Bank.
Q. The American National Bank?
A. Yes, it is included in that statement.

Q. That is, you mean it was paid out of the funds turned over by the American National Bank under the contract of December 21, 1895? A. Yes sir.

Q. Well, Mr. Burness, in this statement marked Exhibit 32, covering your own transactions as trustee, you have paid the Union National Bank $19,000, when was that paid?

A. At different periods.

Q. On which of the notes was it credited?

A. Well I do not remember that; what they call the second and the third note, I rather think.

Q. The second and third note?

A. I do not know, though; the Union National Bank, of course attended to that themselves, I did not pay much attention.

Q. Why did you pay it to the Union National Bank?

A. Under the contract between the American National Bank and the Union National Bank.

Q. Why did not you pay it on the note held by the plaintiff in this case, Mr. Wallace? A. I do not know.

333 Q. You do not know? A. No sir.

Q. To whom did you pay it?

A. To the Union National Bank.

Q. To what person, I mean?

A. Either Mr. Thomas the cashier, or Mr. Wattles.

Q. Mr. Wattles is the President? A. Yes sir.

Q. You paid it to them under the instructions of Mr. Wattles? A. No sir.

Q. Under whose instructions?

A. Not any one's instructions.

Q. Of your own motion? A. Of my own motion.

Q. But you cannot explain why you did not pay it to Mr. Wallace on the first of the three notes? A. No sir.

Q. The next item under the head of Expenditures is Real Estate account taxes, $834.35, what was that paid on?

A. It was paid by check.

Q. What was it paid on?

A. On different pieces of property.

Q. Can you describe them?

A. No, not without looking at the books.

Q. What years taxes?

A. Probably several years, a good part of it was on this Gas farm over in Dalles County, Iowa, part of it there and different other pieces of property.

Q. Is there anything in that item excepting actual taxes?

A. No sir.

Q. How much did you pay on what you call the Gas Farm in Dalles County, Iowa?

334 A. I do not remember now just how much.

Q. Was that farm sold? A. It was sold, yes sir.
Q. To whom was it sold?
A. It was sold to a party by the name of McClure.
Q. For how much? A. About $12,800 I think.
Q. Cash?
A. Cash; there was a mortgage of $5,000 against it.
Q. Did you receive $12,800 cash? A. No sir.
Q. You received that less the amount of the mortgage?
A. Less the amount of the mortgage and interest.
Q. The purchaser assumed that mortgage did he?
A. I think he did, yes sir.
Q. How much cash did you receive from him?
A. I think it was about $7,500.00.
Q. $7,500.00? A. Yes sir.
Q. What is this item paid J. E. Markel, his proportion of rents collected from Waterloo property, $324.27?
A. He owned a half interest in the property which was near Waterloo, Nebraska, and Mr. Robinson out there acted as agent, and collected the rents; they rented a small place there and he remitted the whole amount to either Mr. Kimball or myself and we had to reimburse Mr. Markel, that is pay him one-half. He stood half the expense and got half the proceeds.
Q. What is the item of attorneys fees $375 expended by you?
A. I think there was $100 of that went to W. H.
335 Thompson and the balance to Mr. Blackburn.
Q. Well you had Mr. Blackburn's note, did you not?
A. Yes sir.
Q. Was it applied on that note?
A. Yes sir, the one offset the other.
Q. Then is that $275.00 carried into your cash collections?
A. In the loans and discounts.
Q. What was the service performed by Blackburn?
A. Well, we had several cases in hand, Mr. Kimball agreed to give him several cases, simply to wipe that out, I forget the cases now.
Q. And you do not know anything about what service he performed?
A. I do not recollect now, I think he had one or two suits for the bank [sueing] some party.
Q. Or the value of the services, do you know anything about that? A. No sir.
Q. You do not know anything about that at all?
A. No sir.
Q. And never tried to find out what his services were?

A. No I don't believe I did. It was a matter that was handled more by Mr. Kimball, it came down from Mr. Kimball to me.

Q. Had the cases been concluded? A. Yes sir.

Q. Can you tell what any of the cases were?

A. I think one of them was a suit against Cooley and his wife for a note and we afterwards got a judgment.

Q. Against Judge Cooley? A. No sir, not Judge Cooley.

Q. What Cooley? A. A. H. Cooley.

336 Q. And you got judgment on that note?

A. Yes sir.

Q. What amount did you get judgment for?

A. Well, I don't recollect the amount now, I think it was a pretty large sum, I probably could tell—it seems to me it was six or seven thousand dollars.

Q. Did you collect anything? A. No sir.

Mr. Macomber: Q. He has suggested Walworth, see if you remember anything about that?

A. Yes there was another case, C. H. Walworth.

Mr. Morsman: Q. Was that a suit on a note?

A. It was a suit that was started by Mr. Blackburn and it was afterwards compromised.

Q. By you between Mr. Blackburn and Walworth?

A. Between Mr. Blackburn and myself under the order of the court.

Q. How much did you get in the compromise?

A. About $200, if I remember.

Q. What other case was there?

A. I don't know whether there was any more or not, I rather think they were but small matters compared with those two, I do not recollect just now.

Q. And in fact you paid Blackburn for fees about all that he collected, did you not? A. Yes sir.

Q. What is this item under the [hear] of "Expenditures settlement of Steinberg case $500?

337 A. That was a case in which we had a judgment against Steinberg and others, and we commenced to levy on their goods and found out that Steinberg was not the real owner, or at least they stated that the wife was the real owner and they threatened to sue us for damages and we came to the conclusion, I think the Court authorized it, that we had better settle it ourselves.

Q. And you paid out $500 in settlement of that?

A. Yes sir.

Q. That then really was expenses incurred in liquidating these assets? A. Yes sir.

Q. Why was not that charged to the Union National Bank?
A. I don't know that it would be expense; I suppose it was.
Q. You have frequently examined since you became Trustee, the contract between the Union National Bank and the American National Bank of December 21, 1895?
A. I think I have read it over.
Q. You know, do you not, that provided the Union National should liquidate these assets without expense to the American National excepting attorneys fees and court costs?

Complainant objects as incompetent and immaterial on the ground that after this case was commenced the liquidation was not proceeded under the contract.

A. I rather think the contract provides for that but I do not just remember.
Q. Then why and under whose instructions do you charge this expense in the settlement of the Steinberg case $500 against this fund? Why do you do that?
338 A. I do not know, simply following the footsteps of Mr. Kimball, everything was charged up against that fund.
Q. You did not consult with anybody? A. No sir.
Q. Who did you consult with to reach the determination that it was best to pay the $500 in settlement?
A. I think I consulted with Mr. Wattles in that case.
Q. What did he tell you about paying it out of the funds in your hands and charging it up to this fund?

Complainant objects as not proper cross-examination. This is a matter of bookkeeping and if what the respondents claim that these matters should be paid by the Union National Bank, it is a matter of settlement between the parties as to the amount that is due upon the note.

A. Nothing.
Q. Why did you consult him about it?
A. Well, I thought that he was vitally interested in the assets and ought to be consulted about it.
Q. You knew from your examination of the contract between the two banks that the contract provided for the transfer of the assets of the American National Bank to the Union National Bank, did you not? A. No sir.
Q. Well this item of advertising, postage, etc., $27.40, that is a part of the expense you incurred in liquidating the assets since your appointment as Trustee? A. Yes sir.
Q. And the same is true of the item "Sundries, In-
339 surance, Abstracts, Commissions, etc., $172.43"?
A. Yes sir.

Q. And the item of the Salary of Trustee, $1,633.25 that is your own salary? A. Yes sir.

Q. And who fixed that salary? A. I fixed it myself.

Q. How much did you fix it at? A. $75.00 a month.

Q. And have you been receiving any other salary from any other person? A. No sir.

Q. So that for that salary of $75.00 a month you were serving in your capacity, as Trustee, so called, and also performing Clerical work for the Union National Bank?

A. Well temporarily.

Q. But at different times? A. At different times.

Q. And about how frequently?

A. Well not so very frequently.

Q. Some times three or four months at a time?

A. No sir, about now the clerks at the Union National have been taking their vacations.

Q. How many clerks have been taking their vacations?

A. All of them.

Q. Did you take the place of all them?

A. Well, one at a time.

Q. Well now, under the head of Expenditures, you have stocks, securities, claims, etc., $7,979.90, what is that item composed of?

340 A. That I think is composed mostly of that Curtis note, that has been credited to loans and discounts, and charged to stocks, securities, claims, etc; that is put into the judgment account, simply carrying it from one account to another, that is all.

Q. That was not cash paid out by you? A. No sir.

Q. But you credited it out of the account entitled "Stocks, Securities, Claims, etc" and what account did you charge it into?

A. I credited it out of loans and discounts and charged it to the stocks, securities, claims, etc.

Q. And you opened an account called, or did you have an account called "Stocks, Securities, Claims, etc."?

A. Yes, I had that account.

Q. And you merely transferred it from one account to the other? A. Yes sir.

Q. What was the item composed of, making $7,979.90?

A. I will have to examine it to say what that would be.

Q. You think it is mostly the Curtis note?

A. I think so.

Q. What was to be gained by crediting that out of Loans & Discount and charging it to stocks, securities, claims, etc.?

A. Nothing at all.

Q. Why did you do it?

A. Simply to conform to the book-keeping of the books.

Q. You are speaking now of the books you were keeping?

A. That is what I refer to.

341 Q. Why did you credit the notes of S. S. Curtis out of the account of Loans & Discounts, and charge it into an account called "Stocks, Securities, Claims, etc"?

Complainant objects as already having been answered.

A. Because at that time they were held as notes and chargeable to the Loans & Discount account. Since then they were put into judgment and the Loans & Discount were credited with the face of the notes and the Stocks, Securities, Claims, etc., were charged with the face of the notes plus the interest.

Q. Then by crediting out of the account called loans and discount and charging it into the account called Stocks, Securities, Claims, etc., you make a gain equal to the amount of the interest so far as your book keeping is concerned.

A. Yes sir.

Q. What did you do with that gain?

A. The interest and discount account got credited with that and the stock, securities, claims, etc., account is charged with it.

Q. You have been trying hard to earn your salary to go through with such a performance as that. When you charged it into the Stocks, Securities, Claims, etc., account you still had the asset? A. Yes sir.

Q. And you reported it here to the court or in your testimony here as being an Expenditure, why did you do that?

A. That is a matter of book keeping that is all.

Q. You did not have anything else to do did you?

A. Well sometimes a good deal.

Q. Tell us what you did that for.

342 A. It was the way the accounts were started before I came up there, and I thought I would keep them about the same way.

Q. How much did you credit to interest and discounts on account of that judgment, which you say was credited on the S. S. Curtis notes and which you carried into the account called Stocks, Securities, Claims, etc.?

A. I could not tell without looking up what was the face of the notes and interest calculated at that time.

Q. The whole thing is [ficticious] entry is it not?

A. No sir.

Q. Still you cannot explain what it was done for?

Complainant objects for the reason that he has already explained it two or three different times, changed the security from one account to the other.

A. Well, I cannot explain it any farther than what I have done.

Q. Well, the Walworth judgment was not collected was it?

A. We never had a judgment against Walworth.

Q. You did not obtain a judgment against Walworth?

A. No sir.

Q. You had a suit against him?

A. The suit I think was commenced if I remember rightly.

Q. What disposition was made of the case?

A. Disposed of.

Q. Well, how?

A. I don't remember; it was simply disposed of; we
343 got an order of the court to compromise the claim; it was compromised and the suit dismissed.

Q. You compromised it? A. Yes sir.

Q. So that is the way it was disposed of? A. Yes sir.

Q. Now did you compromise it?

A. On the payment of $300.

Q. What was the amount of the claim?

A. About $3,000 if I remember rightly.

Q. So that asset, whatever it amounted to, was wiped out by the compromise? A. Yes, sir.

Q. This item under the head of Expenditures, "Profit and Loss, $21,040.47", what is that composed of?

A. That is the difference between the amounts received in the settlement of those claims and the balance of the face of the notes.

Q. That is you would charge to Profit and Loss the amount which you failed or found it impossible to collect in making these settlements? A. Yes sir.

Q. Can you give us the items which composed this $21,040.47? A. Not without getting at the books.

Q. Is it all the result of losses by compromise?

A. No sir.

Q. What else is there in it?

A. Well, one account, a real estate account might have a charge against it, and the credit might be enough to offset; after the real estate was disposed of the balance standing to that account would be charged up to Profit and Loss.

344 The further taking of testimony is now adjourned until 2 o'clock P. M.

Omaha, November 1, 190 , 2 P. M.

The same parties being present the Cross-Examination of Mr. Burness is continued by Mr. Morsman, as follows:

Q. Mr. Burness, in this statement which is marked Exhibit 32, that is the statement purporting to cover your own trans-

actions as Trustee, you have under the heading of Expenditures an item designated as "Charged Loans and Discounts, $1750.00, what is that item?

A. The explanation of that, that is the Waterloo property, as we called it, belonging to Markel and the Bank, that was sold sometime ago and the bank and Markel took notes from the purchaser and the real estate was credited with that amount, and the loans and discounts charged with it, so that amount now stands in the Loans and Discounts as notes instead of as real estate as before.

Q. Then it has come into your hands as notes since you became Trustee? A. Yes sir.

Q. In lieu of the real estate? A. Yes sir.

Q. What disposition has been made of those notes?

A. I have got them in my possession.

Q. I suppose they are good notes, are they?

A. O, yes, they are good notes, one of them is due here—no, they do not become due until the first of the year. Yes, I think the notes are good, Mr. Robinson was in the other day and explained the corn crop had not been very good but
345 he thought the parties could raise the money to meet them.

Q. Then when that real estate was sold the real estate account was credited with the proceeds? A. Yes sir.

Q. And in this statement you carried that amount into the column under the heading Collections? A. Yes sir.

Q. What was the amount? A. I think $1750.00.

Q. Even $1750.00?

A. Yes, that is our proportion; we have notes for that amount, and Mr. Markel has similar notes.

Q. And you did not get any cash?

A. We got $100 cash, $5.00—$100.00 cash and $1750 in notes; that is my recollection of it.

Q. I notice that in making up this statement under the heading of Expenditures you have not got all of the items which I see in your expense account, or at least I think you have not, now what method did you resort to in making up this statement in order to get these totals?

A. Well, I think I went over the cash book and picked the different items that belonged to the different accounts out, for instance in the salary account which is charged to the expense account I would have to take out of the balance of the expenses.

Q. Well, but how can we know, and how can you explain that some item of expense contained in your expense account is not, for example, in this item of Stocks, Securities, Claims, &c.? A. That is a different account.

346 Q. And is the balance of that account as shown on the books $7979.90?

A. I do not know exactly what the balance shows; I have not looked to see the balance of it.

Q. You may look and see.

A. The Ledger simply shows the total balance.

Q. Well, this item, Stocks, Securities, Claims, &c., $7,979.90, that is not any disbursement or expenditure by you?

A. No sir; that is simply book keeping; that is all a matter of book keeping.

Q. And why have you not made an itemized statement of your receipts and disbursements showing the source of the receipts and the reasons for the disbursements?

A. Well, I could do that, but I have not done it, giving an itemized statement.

Q. Can you tell by looking at this statement marked Exhibit 32, the amount of cash you have received?

A. No sir, I could not.

Q. You cannot tell the amount of cash you have disbursed, can you? A. No sir.

Q. Nor the source from which you have received cash nor the reasons for any disbursements?

A. Not, from that statement—I can from the books.

Mr. Morsman: Well, Judge, if he will make me an itemized statement showing the sources of receipts and the reasons for disbursements it will save a good deal of time; otherwise I will have to go right through the books.

347 Mr. Burness: It will take a good deal of time to do that; it will be practically a copy of the cash book.

JAMES BURNESS.

By agreement of the parties the further taking of testimony under the annexed notice is adjourned until 10 o'clock on Friday morning, November 8, 1901.

Omaha, November 8th, 1901. 10 o'clock A. M. The same parties being present as at the last hearing, the taking of Depositions under the annexed notice is resumed pursuant to adjournment.

James Burness called for re-direct examination by Mr. Macomber.

Q. Mr. Burness, since you were excused the other day as a witness, have you prepared a statement as requested?

A. I have.

Q. I will hand you Exhibit 33, being the statement referred to by you and will ask you to state, how many pages there are? A. Twenty pages.

Q. Including or excluding the first page?

A. Including the first page.

Q. From what did you make this statement?

348 A. From the books and records of the American National Bank.

Q. How long did it take? A. About a week.

Q. I will ask you if the statement here is a true statement as you take it from the books in your hands as Trustee?

A. It is.

Q. You may state from what period it commences and at what period it ends?

A. It commences December 23, 1895 and ends October 31, 1901, including both days.

Q. What do you say as to the statements in this being true?

A. They are true as far as I know from my own personal knowledge.

A. And what do you say of those that are not of your own personal knowledge being correct as being taken from the books in your possession? A. Well, I think they are correct.

Q. Mr. Burness you may state generally, commencing with the first page, what the Exhibit shows?

A. The second page of the Exhibit shows the cash collections from December 23, 1895 to and including October 31, 1901.

Q. Cash collections of what?

A. Of the assets of the American National Bank. The third page shows part of the disbursements, from December 23, 1895 to and including October 31, 1901; the fourth page is a continuation of that statement and gives the total disbursements $127,744.72; the next page, page five shows the payments through the Union National Bank either on account of principal or interest; page six shows fees paid to at-

349 torneys; page seven, shows payments of interest.

Q. Interest on what?

A. Mostly on real estate and dues, and interest to the Bankers Building and Loan Association.

Q. That is, on obligations not to the Union National Bank or on assets?

A. On obligations not to the Union National Bank except one item here that has been paid to the Union National Bank that amounts to $329.58. Pages eight, nine, ten and eleven, is a detailed statement of taxes paid on different properties.

Q. Whose properties?

A. Belonging to the American National Bank, both in Douglas County and outside of it. Commencing at page twelve, thirteen, fourteen, fifteen, sixteen and seventeen are charges made to Expense Account, for Salaries, Rents, Court costs and Sundry other items. Page eighteen shows the changes since October 8th, 1899, of the Loans & Discounts account, that is in compromising notes, payments that have been made on notes and notes that have been charged off to Profit & Loss on account of the parties taking adyantage of the Bankruptcy Act. The total of this account should now read $185,134.23. Page nineteen is a [ststement] of the "Stocks, Securities, Claims, etc., showing the stocks disposed of, Bonds sold, judgments paid or compromised or wiped out by parties taking advantage of the Bankrupt Act. The total of this account October 31, 1901, is $42,338.49. Page twenty shows the alterations and additions to the Real Estate account. I think that is all.

Q. Does this statement show an account of the assets now on hand, taking it all together?

350 A. With the statement of October 8th, Exhibit No. 30, it does.

Q. This shows the changes in the assets since the date of Exhibit 30? A. Yes sir.

Q. Which you referred to as October 8th, 1899?

A. Yes sir.

Complainant now offers in evidence Exhibit 33, which appears on page 278 hereof.

Q. Mr. Burness, you may state what effort you have made to realize on those assets?

A. I have run around a good deal trying to collect the assets, but as shown on the statement I have not been very successful and I think if the character of the assets were a little better the probabilities are I would have been able to have got more out of them.

Q. Have you made yourself familiar with the assets as to what they are? A. Yes sir.

Q. And the possibility of converting them into money?

A. Yes sir.

Q. And you have also examined into the financial standing of the parties behind those assets, that is the makers of them.

A. Well as far as I could.

Q. And what do you say as to having collected all that you could from them?

A. You mean those that have been collected?

Q. That is the assets?

A. I think I have got all I possibly could.

351 Q. What do you say as to the general character of the assets outside of the real estate, of the collectibility of them since you have had them at this time?

A. My opinion—I don't know whether it is worth very much—I do not consider them worth a great deal, in fact the first time I saw them I was a little surprised at the stuff they had there, I considered them practically worthless, and have so found it in my efforts to collect them.

Q. What do you say as to endeavoring in good faith and diligence to realize on these assets during the time you have had them in your charge?

Each of the respondents object as calling for a conclusion of the witness.

A. I have used due diligence in trying to collect them in every way I could.

Q. Do you recollect about how many suits are now pending against parties on these obligations?

A. No, I do not recollect, they are several I think on hand now, I don't remember just how many.

Q. What condition are the assets in as to being kept alive, that is not barred by the Statute of Limitations?

A. Well, quite a number of them are just about running out I think, and several of them are in suit now to keep them alive, suit has been started on them.

Q. You may state what in your opinion, your services are worth as Trustee, for the purpose of collecting these accounts?

Each of the respondents object as immaterial.

A. I think they would be worth at least $75.00 a month.

Recross-Examination

352 By Mr. Morsman:

Q. The total sum on page 2 of this Exhibit 33, under the heading of "Statement of Cash collected, cash collections from commencement of liquidation December 23, 1895, to and including October 31, 1901" shows $127,744.15, was that the total amount of cash collected? A. Yes sir.

Q. From all sources?

A. From all sources outside of the small balance I entered in to make it agree.

Q. $14.72? A. Yes sir.

Q. Then the total sum collected would be, $14.72 less than $127,744.15? A. Yes sir.

Q. And the statement of the disbursements on pages 3 and 4 show the total amount of disbursements to be $127,744.72, less $3,997.72, now cash on hand? A. Yes sir.

Q. And this statement of disbursements contained on pages 3 and 4, is itemized on page 5, containing a statement of payments paid to the Union National Bank either as principal or interest and on page 6 contained a statement of disbursements for attorneys fees and on page 7, containing a statement of interest disbursed generally, and on pages 8, 9, 10 and 11 containing statement of disbursement for taxes and pages 12, 13, 14, 15, 16 and 17 containing a statement of disbursements on account of Expense does it not? A. Yes sir.

Q. Now, the aggregate of these various statements, itemizing the various disbursements, as I make it, is, $102,105.65, while your general statement of disbursements on pages
353 3 and 4 shows disbursements amounting to $123,767.00, can you explain that?

A. I think probably that is explained on the third sheet.

Q. Does the detail of disbursements to which I have called your attention commencing with page 5, cover the items of $22,799.90 in your general statement of disbursements on page 3? A. It includes part of it.

Q. What part does it include?

A. Interest to December 23, 1895, on Certificates of Deposit, Public Funds.

Q. What is the item in your general statement of disbursements on Page 3 called "Interest to December 23, 1895, on Certificate of Deposit, Public Funds, Bills Payable and Adjustment of Interest on Bills Receivable, taken by Union National Bank, $1250.80" what is that item composed of?

A. Well I don't know that I can explain those items, those items were handled before I had anything to do with the Bank.

Q. Referring to the Schedule of payments made to the Union National Bank, either on account of principal or interest on Page 5, of Exhibit "2", total $66,330.40, was that all paid upon the promissory notes for $67,000.00 each that have been introduced in evidence? A. I think it was.

Q. Can you designate what of the sums set forth here were paid for interest and what was paid for principal?

A. No sir, I cannot.

Q. Does your books show?

354 A. Well I do not think the books would show just exactly what was paid for interest and what was paid for principal; it would have to be taken from the Union National notes how they applied that.

Q. In this total sum of $66,330.40 endorsed as payment on the notes? A. I do not know as to that I am sure.

Q. And is this sum of $66,330.40 the whole sum that has been paid to the Union National Bank?

A. Yes sir, as far as I know.

Q. I noticed in your statement of disbursements on account of interest commencing on Page 7 of Exhibit "33" numerous disbursements of $190.00 to the Bankers Building & Loan Association called "Dues and Interest", what was that for?

A. The Bank I think, held through some other parties—

Q. What Bank?

A. The American National Bank—some shares in the Bankers Building & Loan Association and they negotiated a loan I think of $12,000.00 on Lot 2 Griffin & Smith's Addition and that was in payment of part of the Dues & Interest, that is monthly dues and interest.

Q. That is monthly dues and interest on somebody else mortgage to the Bankers Building & Loan Association?

A. Well, it was virtually the bank's mortgage.

Q. Well, why did you say that?

A. Well, I don't know how that was, that was got before my time.

Q. And you had nothing to do with the business at the time of that transaction? A. No sir not a thing.

355 Q. Do you know what the aggregate sum was paid to the Bankers Building and Loan Association on account of dues and interest on account of that mortgage?

A. No sir; I do not; that could be figured out from the statement, it was included there.

Q. Well I find here an item of $150.00 in this statement of "Disbursements for Interest paid January 28, 1896, Certificate of Deposit No. 6279, Omaha Loan & Trust Company, $150.00" do you know what that is?

A. No sir, I do not, I looked at the records and found that the record of the deposit was $5,000 and that is all I know about it.

Q. Deposited by whom?

A. It was given as the Omaha Loan & Trust Company.

Q. Deposited with the American National Bank?

A. I suppose so, I don't know.

Q. What did the books show?

A. The books show it was deposited with the American National Bank and that certificate issued for it.

Q. Did you ever see the certificate? A. No sir.

Q. What was this item paid March 26, 1896, interest on $5,000 Mortgage, Dallas County, Iowa, land?

A. That was the mortgage on what they used to term "The Gass property".

Q. The Gass farm in Dallas County, Iowa?

A. Yes sir, which was afterwards sold; that is semi-annual interest.

Q. Whose mortgage was it?

356 A. I don't know, I don't know whether the Bank negotiated the mortgage or whether it was negotiated previously by someone else.

Q. The Bank held the title to the land subject to this mortgage. A. Yes sir.

Q. When was that farm sold?

A. It was sold about two years ago I think.

Q. Give the date approximately?.

A. I don't think there is anything to show the date, I think it must have been in the early part of 1900.

Q. What is this item of interest paid May 4th, 1896, called "Interest on $4,000 mortgage Kountze Place $120.00"?

A. That was a mortgage on the Fawcett property of $4,000, I don't know who negotiated that or whether the property was foreclosed and taken in subject to that mortgage, I don't know how we came into possession of it.

Q. You do not know whether the American National had the title to the property subject to the mortgage or not?

A. The American National had the title to the property yes sir.

Q. Has that property been sold?

A. It has been foreclosed.

Q. That is, have you had it foreclosed? A. No sir.

Q. The mortgagee foreclosed the first mortgage?

A. Yes sir.

Q. And has the property been sold under the decree?

A. I don't know whether it has or not.

Q. Is there no showing in this statement anywhere in reference to it?

357 A. There was this showing, I think we got a small payment.

Q. Is that the piece where they paid the $100.?

A. Yes sir, that is the piece.

Q. That is the property in Kountze Place, described as Lot 1 and 2 in Block 17 is it? A. Yes sir.

Q. And you say in your statement on Page 20 of this Exhibit "33" that the mortgagee has taken this on a nominal payment to the Bank, what does that mean?

A. It means we got $100. I don't know whether we gave a quit claim deed to it or not, or whether it was just to let it go. We concluded it was better to take that $100 instead of getting nothing for it.

Q. When did you get that $100 for it?

A. That was in the early part of 1900.

Q. Did you,or Mr. Kimball while acting as Trustee so called, have possession of the property or collect rents from it?

A. Yes sir.

Q. How long did you have possession of it?

A. I think until sometime in 1899; I think the rents were collected until that time, at least part of it.

Q. How much rent did you collect, do you know?

A. I do not remember just now what amount.

Q. What was it rented for?

A. It was rented about that time for $27.50 a month.

Q. Did you collect as much rent as you paid in interest and taxes?

A. I do not know whether we did or not; I think we
358 did pretty close; I think I remember of figuring that up once and at one time I think I figured that it just about paid itself.

Q. What is the present situation of the title to this property in Griffin & Smith's Addition upon which you paid interest for mortgages in the Bankers Building & Loan Association?

A. I do not believe I can tell just what the condition of that is.

Q. What is the amount of the mortgages on the property?

A. The original mortgage was $12000.

Q. And there were four mortgages, were they not?

A. About six mortgages, I think they were reduced to about $9,000.

Q. How was the reduction made, by those payments, that is payments made out of this fund? A. Yes sir.

Q. Where does the title to the property rest now, in the American National Bank?

A. I don't know whether the American National has the title to the property or whether it is in McCague's name.

Q. Have you been making payments on these mortgages and interest on the mortgage loans without knowing where the title was?

A. That was in 1898; I have not made any payments since 1898; that was under Mr. Kimball's handling of the property; the payments were made under Mr. Kimball and the papers will show whether the American National Bank has the title to the property or whether it stands in McCague's name. The probabilities are that the Bank has an assignment if they have not a deed.

359 Q. Have you computed the amount paid to the Banker's Building & Loan Association for interest and principal on those mortgages?

A. No sir; I have not; they simply appear in detail.

Q. Are you able to state from any information [how] in your possession the balance now due upon the six mortgages on this property in Griffen & Smith's Addition?

A. No sir; I am not; at the time the suit was filed I suppose the petition would show the amount then due.

Q. You mean the suit to foreclose the mortgages?

A. Yes sir; that was started.

Q. Is the Banker's Building & Loan Association foreclosing the mortgages now? A. I think they are, yes sir.

Q. And at what stage is the suit now, do you know whether decree has been rendered?

A. I think a decree was rendered and I think it was appealed and carried to the Supreme Court?

Q. Who appealed it?

A. That I do not know; I do not know, I never appeared in the case at all and I do not know anything about it.

Q. This total sum of $10,258.50, on page 7, Exhibit 33, is intended to represent the total disbursements on account of interest, not including the interest paid to the Union National on the three notes of $67,000 each? A. Yes sir.

Q. Now, in the statement of Expense, commencing on page 12, continuing on pages 13, 14, 15, 16 & 17 and showing
360 the total of $14,458.69 you have included all of the expense of liquidating the assets of the American National Bank, have you not? A. Yes sir.

Q. Nothing whatever was charged up to or paid by the Union National Bank?

A. No; there are payments there of $145.83 paid every month when the American National Bank had the funds to pay it, for half the rent of the old Union quarters at 16th and Dodge.

Q. Well, the Union National did not pay that item?

A. The American National paid it to the Union National.

Q. Well, the American National Bank paid all of the expenses included on these pages I have referred to, did it not?

A. Yes sir.

Q. And all of the expenses of liquidating the assets of the American National Bank? A. Yes sir.

Q. Including these items paid monthly to cover one half of the rent of the building formerly occupied by the Union National Bank? A. Yes sir.

Q. Mr. Burness, this resume at the bottom of page 18 of Exhibit 33, purports to show the balance of assets unliquidated October 31, 1901, $185,134.23? A. Yes sir.

Q. And that does not include either stocks, bonds, judgments, securities or claims? A. No sir.

Q. But simply represents the amount of Bills Re-
361 ceivable in your hands that are unliquidated?

A. Yes, what you might call promissory notes.

Q. Not including any interest on them?

A. Not including any interest on them.

Q. And the statement on page 19 shows the balance of stocks, securities, claims, bonds and judgments still unliquidated, of $42,338.40? A. Yes sir.

Q. And the statement on page 20 shows the description of all real estate not disposed of? A. Yes sir.

Q. And some that has been disposed of?

A. And some that has been disposed of, with the statement of October 8, 1899, I think I have put that in there.

Q. Then this statement on page 20 of Exhibit 33, does not include the description of real estate remaining on hand and not disposed of, but simply shows the changes made since October 8, 1899? A. Yes, sir, that is all.

Q. Then the real estate remaining on hand and undispo-ed of will be found in the statement which you had produced and which is marked Exhibit 30, subject to the changes which are shown on this page 20 of Exhibit 33? A. Yes sir.

Q. Now, on page 20 of Exhibit 33 here is an item, "Ambler Place, Lot 12, Block 32, notation, Contract of sale made, $500." what is that?

A. That is the property has been contracted for sale and a part payment has been made on it by the trustee.

Q. Who did it, you? A. Yes sir.

Q. How much was received in money?

362 A. $50.00.

Q. And that I suppose is included in your statement of cash received? A. Yes sir.

Q. And where have you included in this statement the contract from which the balance of $450 is unpaid?

A. Well, it is not included in there.

Q. Not included in the statement at all?

A. No sir; not included in the statement at all.

Q. So that it does not appear any place? A. No.

Q. But the Lot 12, Block 32 appears in the assets?

A. Yes sir.

Q. There is also an item page 20, "South Omaha, Lot 7, Block 121, contract of sale made $500", what are the facts in regard to that?

A. That lot was practically the same as the Ambler Place Lot, $50 has been paid on that, and you might take that other lot with it, the $50., has been paid and it was applied on commissions on both lots; both lots were sold by the same party. Lot 8 has been sold and a deed has been given, and the party wanted the other lot.

Q. That is Lot 8, Block 121, South Omaha?

A. Yes sir.

Q. That has been sold absolutely?

A. Yes; and deed given for it.

Q. This item, page 20, Exhibit 33, "Douglas County undivided half interest in Waterloo property, 23 acres, and E. ½ N. E. ¼ Sec. 10-15-10, and southwest quarter N. W. ¼, Sec. 11-15-10", the notation is "Sold for $3500, one-half to bank."?

363 A. That is what we call the Waterloo property out here in Douglas County, one-half belonged to the bank and the other half belonged to J. E. Markel; that was sold for $3500. The first payment was $100, of which the bank got $50, the other $50 went to Markel, and we got notes for the balance. I have the notes now charged up to loans and discounts, made additions to that statement, I think, of $1750.

Q. Has a deed been made to the purchaser?

A. A deed has not been made yet; I think there is simply a contract for sale.

Q. And you have those notes among the assets still?

A. Yes sir.

Q. Undisposed of? A. Yes sir.

Q. This Dallas County farm that is sold absolutely and closed up?

A. Yes, absolutely, and closed up, and the brick plant the same way.

Q. Explain this item under the head of "Additions 20", on page 20 of Exhibit 33, you say "Additions to 2 inches Tax Lot 16, Section 21-15-13"?

A. I found on Exhibit 30, that the real estate mentioned there was not included in that statement, and should have been.

Q. That is you found the bank owned two inches of ground there more than was included in your Exhibit 30?

A. Yes sir.

Q. And what explanation can you make of the next item "Undivided 1-8 west one-half N. E. ¼ N. E. ¼ Sec. 6-15-13, Douglas County, divided, bank holds 2½ acres"?

364 A. That was a collateral to N. B. Ours note, and he went through bankruptcy and we had a deed to that property, and put it in the real estate and his note was charged up to profit and loss.

Q. The bank has the title to this 2½ acres? A. Yes sir.

Q. Is it unencumbered?

A. Yes, it is unencumbered; it was originally about 20 acres.

Q. What does the word "divided" signify here, that there is a partition of the property made? A. Yes sir.

Q. So that bank now holds the title to 2½ acres?

A. Yes sir, that is my recollection.

Q. What does the item, "Bowling Green, Lots 4, 5 6 and 7, Block 8", and your memoranda or notation is, "From Flack, John F."?

A. It is a deed we got from Flack in our compromise of his indebtedness.

Q. So that the bank has the title to those lots?

A. Yes sir.

Q. What did you compromise with John F. Flack, is he not solvent? A. I don't think he is.

Q. Is he the man connected with the Conservative Building & Loan Association? A. Yes sir.

Q. Explain this item, "Ackerman Place, Lot 2, Block 7, from C. F. Harrison?"

A. That is another lot that was taken in in part compromise of Harrison's note, C. F. Harrison, a real estate man.

365 Q. Who took the title to that Lot from Harrison? Was it taken after December 21, 1895?

A. Yes; I took it as trustee.

Q. To yourself as trustee?

A. I forget now whether it reads to myself as trustee or to the bank; I think I asked him to make it out to the bank; he may have made it in my name; I do not recollect just how it was made out.

Q. And how was the title taken from Flack to Lots 4, 5, 6, & 7 Block 8, Bowling Green?

A. That was to the American National Bank.

Q. Taken before Dec. 21, 1895? A. After.

Q. Who took that? A. I took that as Trustee.

Redirect Examination

By Mr. Macomber:

Q. Mr. Burness, referring to those payments that were made by Mr. Kimball to the Bankers Building & Loan Association, what do you find as to where the title of that real estate was?

A. It is held by the American National Bank.

Q. And it is in your hands as an asset? A. Yes sir.

Q. And the payments were made, as I understand, upon a first mortgage that this Banker's Building & Loan Association had upon the land? A. Yes sir.

Q. Now, on page 7 of this Exhibit 33, that item of $329.58; under a contraction of certificate of deposit, you may explain whether that is one or more certificates?

366 A. It is more certificates.

Q. Do you know anything further about those certificates?

A. Nothing further than they were simply certificates of deposits assumed by the Union National accrued interest up to December 23, 1895.

Q. Assumed and paid by the Union National Bank?

A. Yes sir.

Q. When you say assumed by the Union National Bank you mean it was one of the Bills Receivable that the Union National paid for the American National? A. Yes sir.

Q. And the interest on those you have carried into the interest payments?

A. In the Expense payments it is shown as an interest payment.

Q. Now, all of these payments of interest that appear here under the Interest Account of Exhibit 33, you may state what the fact is as to their being made to preserve the assets of the American National Bank?

Each of the respondents object as calling for the conclusion of the witness.

A. I would think most of the interest charges made there were made by Mr. Kimball and made at that time, I presume to preserve the assets held by the Bank; there may have been a few charges there that were made by myself; but they are very few I think.

Q. Now in a general way, Mr. Burness, what were these expenses paid out for, I ask this question, calling your attention to a question, as I understand, made by Mr. Morsman,
367 that these expenses were all met in the liquidation of these assets, you may state generally what the purposes were that these expenses were paid out for?

A. In a general way they were expenses incurred by the liquidation and charged on that account.

Q. What do you mean by liquidation?

A. Well, in the conduct of the business, collecting the assets and preserving them as far as possible.

Q. I will call your attention to an item here on page 12 in the account of Expense, in Exhibit 33, of Salaries $445.92, you may state if those payments were for salaries before or since the funds went into the hands of the Trustee?

A. They were salaries paid before the funds went into the hands of a trustee; they were paid after Mr. Kimball took hold of them as Trustee, but whether they were salaries prior to December 23 or afterwards, I am unable to state, the books don't show when they were.

Q. In these several items then entries indicating for what purpose the several amounts were paid are true?

A. As far as I know, yes sir.

Recross-Examination

By Mr. Morsman:

Q. Mr. Burness, do you say this item of interest, $329.58 paid December 27, 1895, was interest accrued on certificates of deposit issued by the American National Bank?

A. Yes; certificates of deposit issued by the American National Bank.

Q. Assumed by the Union National Bank?

A. They had assumed the certificates of deposit entirely and at that time the interest was not paid, when the certificate

was issued, and there was accrued interest up to that date, so that after the Union National took those certificates
368 they would be liable for the face value with the interest added.

Q. That was the accrued interest then, on outstanding certificates of deposit? A. As I understand it, yes sir.

Q. Which the Union National Bank assumed?

A. Yes sir.

Q. You do not know, do you, that this $329.58 was not included in the amount of the three notes for $67,000 each?

A. I do not, no sir.

Q. You did not make this payment yourself, $329.58?

A. No sir.

Q. You simply find it on the books kept by Mr. Kimball?

A. Yes sir.

Q. This interest paid on County funds, $293.24, you do not know that this is not included [un] the three notes for $67,000 each? A. I do not, no sir.

Q. You simply find it on the books kept by Mr. Kimball?

A. Yes sir.

Q. Or the item of $7.94, interest paid on City Funds?

A. No sir.

Q. Or the item of $147.20 paid to William Minot?

A. No sir.

Q. Or the item of $20.61 paid to the Lawrence Bank?

A. No sir.

Q. Do you know whether the item of $252. paid Dec. 28, 1898, entered on your statement of Bills Payable,
369 whether that was included in these three notes of $67,000 each? A. I do not.

Q. Can you give any explanation of it? A. No sir.

Mr. Smith: I suppose if we desire any further cross-examination we can have it.

Mr. Macomber: Yes, certainly.

JAMES BURNESS.

Stamped: Filed Dec. 30, 1901. Geo. H. Thummel, Clerk.

370 Mr. G. W. Wattles, of lawful age, being first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Direct Examination

By Mr. McCulloch.

Q. State your name? A. G. W. Wattles.

Q. Mr. Wattles, what is your business? A. Banking.

Q. With what Bank are you connected?

A. Union National Bank.

Q. How long have you been connected with the Union National Bank? A. Ten years.

Q. What was your position with the Union National Bank in December, 1895? A. Vice President.

Q. Do you remember the time the contract was made between the Union and American National Bank whereby the Union went into the building formerly occupied by the American and assumed the deposits of the American National Bank? A. I do.

Q. Were you present at the time of the carrying out of the transactions and turning over of the assets and deposits etc., that constituted that contract? A. I was.

Q. Who was present at that time besides yourself?

A. Mr. Kimball, Mr. Wyman, Mr. Ford, Mr. Marsh and myself.

371 Q. Now, you may state just in a general way what was done at that time to determine the assets which were taken by the Union National Bank under that contract and the settlement that was made?

A. The amount of liabilities of the American were ascertained from the books of the bank, including the amount due depositors, the amount due on notes payable and the amount due to any other creditors; from this amount was deducted the cash on hand which was turned over by the American to the Union; the balance as I remember it, amounted to about $240,000.

Q. Now, when you say balance—

A. The balance of liabilities of the American National Bank over and above the cash assets that they had on hand. Under the terms of the contract the Union National Bank agreed to take absolutely those notes which they might approve on examination. This examination was not made for a few days after the transfer, but it was estimated when the transfer was made that the Union National would not take more than $40,000 of the notes, on a casual examination, and therefore, the American National gave its notes to the Union National for the amount of $201,000, as I remember.

Q. In three notes?

A. In three notes of $67,000 each, and for the balance gave a cashier's check of about $39,000, with the understanding that this cashier's check was to be paid out of the notes that the Union took absolutely in so far as these notes were purchased.

Q. So that at the time the $201,000 in notes were given to represent the difference between that and the $240,000

372 a cashier's check of $39,000 was given? A. Yes sir.

Q. Now, after that was there any adjustment of that

cashier's check on the basis of the Union taking any of the notes, and if so, what was that adjustment?

A. Yes, sir; there was, I should say a week or ten days, possibly longer, after the transfer the notes were examined and about $21,000, as I recall, of these notes were selected and taken over by the Union absolutely, from the American, and the amount of them was credited on this cashier's check, or rather, this $39,000 cashier's check was taken up and a new one issued for the balance after the notes had been deducted.

Q. And then what did the Union National do with the $17,000 cashier's check, or what was done with it finally?

A. It was held until it was finally paid.

Q. By whom? A. By the American National.

Q. Through whom? A. Mr. Kimball.

Q. Now, Mr. Wattles, you may also state what was done at that time, if anything, with the assets of the American National which were not assumed or taken by the Union National?

A. They were turned over to Mr. Kimball, or rather they remained in the possession of Mr. Kimball.

Q. Where did Mr. Kimball from that time on have his office?

A. He had his office in the director's room of the Union National Bank.

Q. That was the same office room, was it, that is, the old banking room was the same banking room, that had theretofore been occupied by the American? A. Yes sir.

373 Q. Where was the Union National Bank located before that time? A. At the corner of 16th and Dodge.

Q. And where had the American National Bank been located and the Union National Bank removed to?

A. Corner of 15th and Dodge.

Q. Its present location? A. Yes sir.

Q. You may state, Mr. Wattles, who, if any one, assisted Mr. Kimball, or was in his employ in the collection of the assets from that time on?

A. Mr. Wyman was employed for the first year or two.

Q. What Wyman was that, what position had he held before?

A. Mr. Henry Wyman, he had formerly been Cashier of the American National.

Q. And about how long did he remain with Mr. Kimball? in the collection of the assets?

A. I think a little over a year; I am not positive though.

Q. And who succeeded him, if you remember?

A. Mr. Burness.

Q. The man who is now acting as Trustee? A. Yes sir.

Q. Mr. Kimball is dead? A. Yes sir.

Q. You may state Mr. Wattles, what, if any, control the Union National Bank had or exercised over these assets which you say were left in the hands of Mr. Kimball? A. Not any.

Q. And what it had to do in their collection?

374 A. Not any control over them and had nothing to do with their collection.

Q. By whom was that attended to?

A. By Mr. Kimball and Mr. Wyman; later on by Mr. Burness.

Q. You may state, Mr. Wattles, whether during any of the time of the control of these assets by Mr. Kimball or Mr. Burness you or the officers of the Union National Bank were consulted with reference to their collection or disposition, and if so, at what time did it commence and under what circumstances?

A. Yes sir, I was consulted frequently regarding the compromise of notes and sales of property after it was discovered that the assets were not sufficient to pay the notes of the American National; I think about two years, perhaps less than two years after these notes were given; it became apparent that the assets were not sufficient to pay the notes. Then Mr. Kimball talked with me about it, and said that he thought it was proper that I should be advised with concerning any compromises of notes or sales of property that were made after that time, and I was advised with by Mr. Kimball and have been since by Mr. Burness.

Q. Have you been, Mr. Wattles, in a situation where you could observe and see and know the work that was being carried on by Mr. Kimball and Mr. Wyman, and subsequently by Mr. Burness in their efforts to collect these assets?

A. Yes sir.

Q. You may state in a general way just what was done in that regard?

375 A. Mr. Kimball and Mr. Wyman started vigorously to collect the assets, to collect the notes, and Mr. Wyman went out of the bank frequently and saw parties that were owing the bank, urged them to pay, brought parties in to the bank to consult with Mr. Kimball, and they talked together with debtors of the American National and urged them to pay; and they sought to sell the real estate and other property that they held and did sell some of it, and were quite busy for the first year or so.

Q. Did Mr. Wyman put in his whole time there?

A. Yes sir.

Q. And Mr. Kimball also? A. Yes sir.

Q. So that they both were in the office working upon the assets of the American National Bank every day?

A. Yes, for some time, and as long as Mr. Wyman was employed.

Q. And after Mr. Wyman left, who, if anybody, assisted Mr. Kimball? A. Mr. Burness.

Q. And that continued up until what time?

A. Until the time that Mr. Kimball was appointed Trustee by the court, and even after I think, Mr. Burness was in his employ. I will change that answer. I had in my mind that Mr. Kimball was appointed trustee, I will say up until the time Mr. Burness was appointed Trustee by the court.

Q. You may state, Mr. Wattles, whether or not you were acquainted with the general business situation in the City of Omaha and surrounding country along about the beginning of the year 1896, and subsequent to the time of the bringing of this suit? A. I was.

376 Q. And you may state what that was and what difficulties, if any, there were with the collection of the accounts?

A. The conditions in the City of Omaha and the state of Nebraska were very bad; it was very difficult to collect notes from people who owed during that period, very hard to realize the value of property on sales during that period.

Q. What was the condition of the real estate?

A. There was very little real estate changing hand; that that was sold during that period was sold at very low prices.

Q. And going back for a moment to the original transfer which resulted in the giving of these three notes, in evidence, you may state what was done by the Union National Bank in the assumption of the deposits, how was that transaction carried out?

A. The balance standing to the credit of the depositors of the American National as shown by their books at the close of business on the date of the transfer, December 21, 1895, were transferred to the books of the Union National Bank and were paid. These balances were assumed and were afterwards paid by the Union National Bank.

Q. Are you able to state, Mr. Wattles, about what proportion or what amount of those deposits were called for within a short time after their assumption by the Union National, within, say the next thirty days or during January of the following year?

A. Yes sir; more than half of the deposits and liabilities assumed by the Union were called for and paid in money within the next thirty days after the transfer.

377 Q. Calling your attention to a paper which has been marked in this case as Exhibit 25, I will ask you if you ever saw that paper before? A. Yes sir; I have.

Q. Calling your attention to the signature or the writing of the name, Chas. W. Morton, I will ask you if you know whose signature or whose handwriting that is?

A. Yes sir, I know that to be the handwriting of Charles W. Morton.

Q. You were acquainted with Charles W. Morton?

A. Yes sir.

Q. Calling your attention to the next name on the same paper, James H. Morton, do you know whose writing and signature that is? A. Yes sir.

Q. Whose is it? A. James H. Morton of this city.

Q. You are acquainted with him? A. Yes sir.

Q. Calling your attention to the next signature, Mary E. Morton, are you acquainted with her? A. No sir, I am not.

Q. You do not know whether that is the signature of Mary E. Morton or not? A. No sir.

Q. Now, Mr. Wattles, you may examine that paper thoroughly and after having examined it, state when you first saw it in its present condition, if you are able to state?

A. I cannot give the exact date, but it was sometime between the 21st day of December, 1895, and the date of the meeting of the stockholders of the American National
378 Bank, on which they voted to go into liquidation—I think that was the 21st day—no, not the 21st—some day in February 1896.

Complainant now offers Exhibit 25 in evidence. Copy on page 259; original on page 261.

Cross-Examination

By Mr. Morsman:

Q. Mr. Wattles, how long after December 21, 1895, to your best recollection was it that you first saw this paper which has been marked 25 and last mentioned in your examination in chief?

A. As near as I can recollect it was a day or two before the meeting of the stockholders of the American National Bank that I saw the paper.

Q. And that meeting, you think was February 26, 1896?

A. Yes sir.

Q. Do you know who got up this paper marked Exhibit 25?

A. Yes sir.

Q. Who. A. Mr. Kimball.

Q. At [those] instance? A. I do not know.

Q. Did he consult with you about it or you with him, before getting it up? A. No sir.

Q. How do you know that he got it up?

A. He showed it to me before the meeting of the stockholders of the American in reply to a question I asked him regarding the probability of a favorable vote to liquidate the bank. He showed me this paper at that time and said that more than the required amount of stock had approved of this action and signified their approval by signing this paper,

379 and he did not think there would be any doubt about the vote at the stockholders meeting.

Q. And was this paper gotten up and the signatures procured with a view to ascertain what the probable result of that meeting would be? A. I do not think so.

Q. But you did not see it at all until about February 26, 1896? A. A day or two before that as I recollect it.

Q. And it is your best judgment that it was gotten up and signed just a day or two before this meeting?

A. No sir; I think it was gotten up immediately after the transfer was made and signed during the next week or ten days after the transfer was made.

Q. Why do you think so?

A. From something that Mr. Kimball has said to me in regard to it.

Q. You do not know the date when it was signed by any of these stockholders? A. No sir; I do not.

G. W. WATTLES.

By agreement of parties the further taking of testimony under the annexed notice is adjourned until Saturday November 16, 1901 at 10 o'clock A. M.

380 Omaha, Saturday, November 16, 1901, 10 A. M.

The same parties being present as heretofore, the further taking of testimony under the annexed notice is resumed as follows:

Mr. James Burness, called for further cross-examination on the part of respondents:

Examined by Mr. Smith:

Q. Mr. Burness, in your statement marked Exhibit "30", under the head of Expenditures, on page 1, you say, "Expenses prior to liquidation, $4985.99", do you not? A. Yes sir.

Q. Now, in your statement marked Exhibit "33", on page 3, you have the amount off on the right, evidently an addition, $4985.99, now is that the same $4985.99 that is on the other exhibit? A. That is the same.

Q. Now, I see that in this item, that is one of the items going to make up this item of $4985.99, is attorneys fees, $2589.98, is it not? A. Yes sir.

Q. And will you turn to page 6 of your Exhibit "33" and state what items added together make up this $2589.98?

A. Well, I think it would be difficult to do that for the reason that the probabilities are that there are some costs added in with the attorneys fees to make up that amount, but the attorneys fees that are put in as prior to liquidation that is the $4900, and the attorneys' fees added after that, and the statement on page 2—page 3—probably make the total amount of the attorneys' fees of the two items.

381 Q. Now, what do you mean by the word "liquidation" which you used on page one of Exhibit "30"?

A. Well, I took that word from a statement that had been previously made by Mr. Wyman; I just used the same word.

Q. That is, by Mr. Wyman for Mr. Kimball, you mean?

A. Yes sir.

Q. It was Mr. Kimball's statement in reality, was it not?

A. Yes sir.

Q. And you have no means of knowing, have you, whether that word "liquidation" refers to the 21st day of December, 1895, or the 25th or 26th of February, 1896, or a later date, have you?

A. No means of knowing, no; although I took it for granted, of course, that it meant the 21st day of December.

Q. Now, turning to page 6 of Exhibit "33", I find the entry December 30, 1895, "H. B. Smith, $700.00", now do you know what [the] time the account or bill for that was rendered to the American National Bank?

A. Well, I looked [—] up the other day; I found a lot of bills and amongst them that one, dated March 20, 1895.

Q. Now, how is it with reference to the item of $333.33?

A. There was a bill dated December 27, 1895.

Q. And that referred to matters previous to December 21st?

A. Yes sir; I think that bill read "For services", or something, "March, 1895".

382 Q. Now take the item of 1896, January 11th, H. B. Smith, Franklin Savings Bank vs. Nichol, $327.20, do you know when that bill was rendered?

A. That bill was dated December 18, 1895.

Q. Now, the item of January 27th, Hall & McCulloch, Holdrege Bond suit, $1,000, that was for services performed before the 21st day of December, 1895, was it not?

A. As I understand it, yes sir.

Q. The next item is "1896, May 26, H. B. Smith, on account, $150.00", now were there any accounts that had been filed against the bank prior to May, 26, 1896, by Mr. Smith?

A. Well, those bills that have been mentioned were prior to that date.

Q. And this payment was upon those bills, on account of those bills that had been filed prior to that time?

A. I think probably, evidently had.

Q. I see [it] the words "on account" here. Then state whether or not the total amounts appearing to have been paid to Mr. Smith here was less than the bills rendered by Mr. Smith to the American National Bank?

A. Yes, the total amount that appears there was less.

Q. And were those bills that had been rendered by Mr. Smith for services that had been performed prior to or after December 21st?

A. They all seemed to be prior to December 21st; in fact all the payments that have been made to Mr. Smith there seemed to have been on business prior to that date, as far as I could see, looking at the bills.

383 Q. Now, turning to page 1 of Exhibit "30", I find the item under the head of "Expense, attorneys fees, $2114.93", can you by turning to page 6 of Exhibit "33" show what items go to make up that item?

A. No; I do not believe I could by that exhibit.

Q. Now, turn to your Exhibit "33", page 13, and find this item, "June 29, 1896, Omaha Mercury, advertisement, liquidation, $6.85," what was that?

A. I do not know what that was.

Q. Well, would you say from your best judgment that that was a payment for a legal advertisement in some paper?

A. Yes; I should judge it was.

Q. Now, is that true of the item of "July 13, Stumpf & Hemer, liquidation notice, $10.00"?

A. I suppose that would be the same thing, although it is something I do not know anything about.

Q. I think you testified on your direct examination that the books of the American National Bank were closed on December 21, 1895, and that they were thereafter continued by Mr. Kimball? A. Yes sir.

Q. Were there other books of account opened by him at that time or after that time?

A. Well, the old books were simply continued.

Q. There were no new books used?

A. Not that I know of; I don't know of my own knowledge.

384 Q. Do you know of any other accounts kept by Mr. Kimball in any capacity other than the ones which you have itemized here in Exhibits "32", "31" and "33"?

A. No, I do not.

Q. So far as you have discovered there have been no other accounts kept by Mr. Kimball in any capacity?

A. None that I know of.

Q. I note on page 12 of Exhibit "33", under the head of Expense the item of "February 3, One half rent Union old quarters, $145,83", was that for the rental of the quarters that had been occupied by the Union National Bank before it moved over to the offices of the American National Bank?

A. Yes sir.

Q. When did that payment commence, what month?

A. I suppose it commenced on December 23, 1895.

Q. Please look at your account, does not your account show that on January 6, 1896, there was rent for December paid of $300.?

A. Well, I think that was the rent of the American quarters.

Q. Then this item of $145,83 is the rent for the one-half of the old Union quarters for February, 1896?

A. I do not know; it may be January or may be February.

Q. It was paid in February?

A. Well, I suppose it is January; I rather think it is January; I could not say as to that.

385 Q. Do you find any other item of that nature later than December 27, 1897, on page 14?

A. No; I do not think there is any payments later than that; I think that is the last payment that was made on that account.

Q. And those payments were made monthly during the period from the first item I gave you until the last item I gave you?

A. In so far as the funds of the American would allow I don't know that payments were made every month; sometimes we were a little short in cash and it went over to the next month, but there was paid on that account $145.83 every month.

Q. Did these payments cease when the Union National rented its old quarters? or when its lease expired?

A. I think so, although I do not know; I suppose it would; I never saw the lease. I do not know when it expired.

The further taking of depositions under the annexed notice is adjourned to meet, by agreement of parties, on Friday, November 22, 1901, at 10 o'clock A. M.

JAMES BURNESS.

Stamped: Filed Dec 30, 1901. Geo. H. Thummel, Clerk.

386 Omaha, Nebraska, Friday, November 22, 1901, 10 A. M.

The same parties being present as heretofore, the further taking of depositions under the annexed notice is resumed pursuant to adjournment.

Mr. G. W. Wattles, called for further examination by complainant.

Examined by Mr. McCulloch:

Q. Mr. Wattles, in your examination the other day you stated that from time to time you were consulted by Mr. Kimball with reference to these assets, you may now state how often you talked with Mr. Kimball in a general way about these assets and about when those talks began, and what was the occasion of them?

Each and all of the defendants object on the ground that it is incompetent and immaterial.

A. The talks began about a year after the assets were turned over to Mr. Kimball as trustee. The occasion was that the payments in the Union National Bank had about ceased, and it became important to me as an officer of the Union National Bank to investigate the security behind the notes of the American National which we held. I [meade] inquiries of Mr. Kimball and he then laid the securities before me and we examined them and looked them over and talked them over very carefully many times from that time on until I became quite thoroughly conversant with the value of the notes and assets which he held.

Q. That you say was about one year after Mr. Kimball had taken charge as trustee? A. Yes; I think about a year.

387 Q. You may state, Mr. Wattles, whether from that time on you have had a general knowledge from these various examinations of the condition and situation of these assets? A. I have.

Q. And are you acquainted at the present time with the assets which are still in the hands of Mr. Burness, trustee?

A. I am.

Q. And you may state whether or not you have a knowledge of not only the condition, but the general value of these various assets? A. I have.

Q. You may state, Mr. Wattles, what in your judgment the assets which still remain undisposed of are worth, or what could be realized on them?

Each and all of the defendants object as incompetent, immaterial and calling for the opinion of the witness, and also being too general and vague.

A. Somewhere from $10,000 to $20,000.

Q. What position do you hold at the present time in the Union National Bank, Mr. Wattles? A. President.

Q. Whom did you succeed as President?

A. W. W. Marsh.

Q. He was the Mr. Marsh who was president of the Bank at the time this contract in controversy was executed?

A. Yes sir.

388 Q. You may state whether or not Mr. Marsh is still living? A. He died in April, 1901.

Q. Were you acquainted with William Minot, mentioned in this examination? A. I was.

Q. You may state whether or not he is still living?

A. He is not; he died in the Fall of 1900, as I recollect.

Q. Were you acquainted with Mr. Dufrene, one of the directors of the American National Bank at the time this contract was made? A. I was.

Q. You may state whether or not he is still living?

A. He is dead.

Q. About when did Mr. Dufrene die? A. I think in 1899.

Q. Since the commencement of this action, was it not?

A. Yes sir.

Q. You may state about Mr. Kimball, the President of the American National Bank, is he still living?

A. He is not; he died in 1899, I believe, or 1900.

Q. Mr. Wattles, you may state whether or not you are acquainted with the signature of the present Comptroller of the Currency, Mr. Ridgely? A. I am.

Q. Calling your attention to a paper which the reporter will mark as Exhibit "34", and which purports to be a certified copy of a portion of the records of the Comptrollers office, you may state whose signature appears to the certificate of that Exhibit?

389 A. William B. Ridgely, the Comptroller of the Currency.

Complainant offers Exhibit "34" in evidence.

Each and all of the respondents object as immaterial and irrelevant. Copy on page 300. Original on 298.

Cross-Examination

By Mr. Morsman:

Q. How did you become acquainted, Mr. Wattles, with the signature of the Comptroller of the Currency?

A. By the receipt of documents and papers connected with the Union National Bank.

Q. You never saw him write his signature? A. No sir.

Q. You never saw any signature that you personally know he acknowledged to be his own? A. No sir.

Q. What control, supervision or direction did you or any other of the officers of the Union National Bank exercise over the disposition and liquidation of the assets of the American National after December 21, 1895?

A. Not any, except in an advisory capacity.

Q. Will you just explain as fully as you can, Mr. Wattles, to what extent you acted in an advisory capacity yourself, or any other officer of the Union National?

A. Nearly all of the consultations between the trustee and any officer of the Union National Bank were held by me on the part of the Union National Bank; first, Mr. Kimball would consult with me, and after he died, Mr. Burness. As I explained in my direct examination these consultations
390 commenced about a year after Mr. Kimball took possession of the assets as trustee, and they were begun on the statement from me to him that I thought we were not receiving [sufficinetly] frequent payments on the notes of the American National, one of them having become due and not having been paid; and I thought we should be allowed to look into the security and advise with him regarding the liquidation or the realization of the money on the assets in his hands. He agreed with me that it was then apparent to him that the assets were not going to be sufficient to pay out the amount of the notes, and therefore we should be consulted. Frequently after that conversation he would ask me about the advisability of compromising a claim if offers of compromise were made, and I advised with him as often as he submitted any matters to me; and frequently I asked him about certain of the assets, inquired into the progress that was being made to convert them into money.

Q. There was never any disagreement between yourself and Mr. Kimball, was there, or any other officer of the Union National Bank? A. None whatever.

Q. Or between yourself or any other office- of the Union National and Mr. Burness? A. No sir.

Q. Had you prior to the expiration of one year from the date of the contract, December 21, 1895, made any effort to exercise any control or supervision over the liquidation or disposition of the assets? A. No sir.

391 Q. You considered the three notes that were held by the Union National Bank as an absolute debt of the American National Bank to the Union National Bank, did you not? A. Yes sir.

Q. And gave no attention to the subject of the liquidation of the assets until about the time that the first of the notes, according to its terms, matured? A. No sir.

Q. Then after that you gave more attention to the subject?

A. Yes sir.

Q. But everything was done by Mr. Kimball so long as he lived, and afterwards by Mr. Burness, that you suggested or desired to be done, with a view to the liquidation of the assets?

A. I cannot say that exactly because I did not give advice, unless consulted or advised, on my own motion; but whatever advice was given, under the circumstances, as I have outlined, was usually acted on.

Q. Then if you did not suggest or advise on your own motion or make any demand with reference to the matter everything was in fact done by them which you requested to be done?

A. Yes; there was never any disagreement between us. I might make a request to have something done and they would give me sufficient reason why it would not be done and then it would not be done.

Q. You would accept their reasons as being sufficient?

A. Yes; we would talk it over together.

G. W. WATTLES.

392 COPY OF EXHIBIT "1".

Agreement.

This Indenture Witnesseth, That the American National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the first part, has and by these presents does hereby agree for the considerations hereinafter expressed to and with Union National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the second part, as follows, to-wit:

First:—The party of the first part hereby agrees to sell and assign and does hereby sell and assign to the party of the second part the business of the party of the first part, its cash on hand, office furniture and fixtures and such of its bills receivable as the party of the second part on examination may be willing to take as cash without recourse on the party of the first part.

Second:—The party of the second part hereby agrees to purchase and does hereby purchase from the party of the first part the business of the party of the first part, cash on hand, office furniture and fixtures, and such bills receivable as the party of the second part may be willing to take as cash on examination of the same without recourse on the party of the first part and to pay the party of the first part for said office furniture and fixtures the sum of Three Thousand Seven Hun-

dred and Fifty ($3,750.00) [—] and to assume the liabilities of the party of the first part to its depositors and on account of its bills payable and to liquidate the remaining assets of the party of the first part which may not be taken and received
393 as cash by the party of the second part without charge or expense to the party of the first part, except such court charges and attorney's fees as may be found necessary, and that such [kuquidation] shall be conducted under the direction of Thomas J. Kimball or such other person as may be agreed upon on behalf of the st-ckholders of the party of the first part, it being understood and agreed that said Kimball or his successor shall represent in said liquidation the stock-holders of the party of the first part, and shall receive, hold and use the proceeds of the assets of the party of the first part as trustee of the parties hereto for the mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary Court charges and attorney's fees attending said liquidation shall be incurred under the direction of the said Kimball, or his successor.

Third:—In consideration of the above agreement of the party of the second part, the party of the first part hereby agrees to sustain and pay one-half of the loss and expense which the party of the second part may sustain on account of removal from its presen. quarters by reason of its unexpired lease on its present place of business, and one half of the loss which the party of the second part may sustain on the sale of its office furniture and fixtures, which furniture and fixtures are agreed upon at the present price and value of Three Thousand Seven Hundred and Fifty ($3,750.00) Dollars, and the party of the first part further agrees to guarantee and does
394 hereby guarantee the party of the second part against any and all loss on account of assuming the liabilities of the party of the first part as aforesaid. And to this end the party of the first part agrees to execute and deliver to the party of the [secnnd] part its three promissory notes of equal sums for the amouat of liabilities [whoch] the party of the second part may assume after crediting the full amount of cash on hand and bills receivable and other assets which may be accepted by the party of the second part on examination, which notes shall draw interest from date at the rate of six per cent. per annum, payable quarter annually, and be payable in one, two and three years from date respectively, and shall be non-negotiable. And in case of non-payment of any of said notes when due the whole of said principal sums of all of said notes and accrued interest shall thereupon become due. And as further security to the party of the second part the

party of the first part agrees to sell and assign and does hereby [seell] and assign to the party of the second part all of its assets which may remain after the selection therefrom by the party of the second part heretofore mentioned, including all its bills receivable, stocks, bonds, personal property of every kind and all real estate and rights and interests therein or liens thereon, with the understanding and agreement that the party of the second part shall have and hold said assets and properties subject to the right of the said Thomas L. Kimball, or his successor, to collect and convert the same into cash for the uses and purposes hereinbefore expressed.

And it is further agreed that the party of the first
395 part may pay and have credited on said notes at any time prior to maturity any sums of money of Five Hundred ($500.00) [—] and upwards, provided the sums so paid shall be in even hundreds.

Witness the names and corporate seals of the parties hereto this 21st day of December, A. D. 1895.

THE AMERICAN NATIONAL BANK
OF OMAHA,

Attest: By Thos. L. Kimball, President. [Seal]
Henry F. Wyman, Cas.

UNION NATIONAL BANK OF OMAHA,

Attest: By Wm. W. Marsh, Pt. [Seal]
Chas. E. Ford, Cashier.

Endorsed on back: Agreement Between American National Bank and Union National Bank.

396 COPY OF EXHIBIT "2".

$67,000.00 Omaha, Neb., Dec. 23, 1895.

One year after date for value received we promise to pay to The Union National Bank, Sixty Seven Thousand Dollars at its Banking Office in Omaha, Neb., with interest at 6 per cent per annum from date, payable quarterly until paid

No. 7397 THE AMERICAN NATIONAL BANK,
By Thos. L. Kimball, President.

Attest: Henry F. Wyman, Cas.
Due Dec. 23, 1896.

Endorsed on back as follows:
Paid Jan. 27 1896, $3000.00
Paid Feb. 29, 1896, $3000.00
Paid Mar. 10, 1896, $1000.00
Int. paid to Mch. 23 1896.
Paid May 5, 1896, $6000.00

Paid May 16, 1896, 4000.00
Int. paid to June 23, 1896.
4/16/97 Interest paid to Mch. 23, 1897.
4/16/97 Paid Mch. 23-1897-$8235.
Paid May 12 1897 $4000.00
Pay Sumner Wallace or order without recourse

UNION NATIONAL BANK,
By J. W. Thomas, its Cashier.

Aug. 8th, 1898.

397 COPY OF EXHIBIT "3".

$67,000.00 Omaha, Neb. Dec. 23, 1895.

Two years after date for value received we promise to pay to The Union National Bank Sixty Seven Thousand Dollars at its Banking Office in Omaha, Neb., with interest at 6 per cent. per annum from date, payable quarterly until paid.

THE AMERICAN NATIONAL BANK,
By Thos. L. Kimball, President.

Attest: Henry F. Wyman, Cas.
No. 7398.
Due Dec. 23, 1897.

Endorsed on back as follows:
Int. paid to Mar. 23, 1896.
Int. paid to June 23 1896.
Int. paid 2/17/97 to Sept. 23 1896.
4/16/97 Interest paid to Mch. 23-1897.
Mch. 16-1899 Paid on principal $2000.00
2/8/00 Int. Pd to Aug. 6, 1897, 1500.00
5/12/00 Int. pd to Nov. 18, 1898, $5m.

398 COPY OF EXHIBIT "4".

$67,000.00 Omaha, Neb. Dec. 23, 1895.

Three years after date for value received we promise to pay to The Union National Bank Sixty-seven Thousand Dollars at its Banking Office in Omaha, Neb., with interest at 6 per cent per annum from date payable quarterly until paid.

THE AMERICAN NATIONAL BANK,
By Thos. L. Kimball, Pres.

Attest: Henry F. Wyman, Cas.
Due Dec. 23, 1898.

No. 7399.
Endorsed on back as follows:
Int. paid to Mch. 23, 1896.
Int. paid to June 23, 1896.
Int. paid to Dec. 23, 1896.
4/16 Interest Paid to Mch. 23rd 1897.

March 16-1897 Paid on principal, $2000.00
2/8/00 Int. Pd to Aug. 6, 1897, 1500
5/12/00 Int. Pd. to Nov. 18, 1898, $5.m.
Nov. 7, 1990, Paid, J. B. Tres. $5000.00

399 EXHIBIT "6".

Regular Directors Meeting
Held December 10th 1895

Present: Mr. Thos. L. Kimball
Mr. A. U. Wyman
Mr. E. M. Morsman
Mr. Wm. Baird
Mr. A. R. Dufrene
Mr. Chas. C. George

The minutes of the meeting held November 19th were read and approved. On motion of Mr. Baird, seconded by Mr. George the following resolution was unanimously adopted.

Be it Resolved, That in accordance with the requirements of Article Eight (8) of the Articles of Association of The American National Bank of Omaha, Nebraska, the shareholders be notified that at the regular annual meeting of the shareholders of the Association which will be held at the office of said Association on the 14th day of January 1896, there will be submitted to them for their action the following:

Resolution to amend Article Three (3) of the Articles of Association of The American National Bank of Omaha, Nebraska. Be it Resolved, That Whereas the first sentence of Article Three (3) of the Articles of Association of The American National Bank of Omaha, Nebraska reads as follows, to-wit:

"The Board of Directors shall consist of nine (9) shareholders". The same be and hereby is amended so that it shall read "The Board of Directors shall consist of seven (7) shareholders."

On motion of Mr. Morsman, seconded by Mr. Wyman
400 the Reports of Loans and Discounts for the weeks ending November 16th, 23rd and 30th were read and approved.

The meeting adjourned.

THOS. L. KIMBALL, Pres.

Attest: Henry F. Wyman, Cas.

Copies of the following were mailed or delivered to each stockholder on December 11th & 12th 1895.

December 10th, 1895.

"To The Stockholders:

At a regular meeting held this day the Board of Directors of The American National Bank of Omaha, Nebraska, unanimously adopted the following resolution.

Be It Resolved That in accordance with the requirements of Article Eight (8) of the Articles of Association of The American National Bank of Omaha, Nebraska, the shareholders be notified at the regular Annual Meeting of the shareholders of the Association, which will be held at the office of said Association on the 14th day of January 1896, there will be submitted to them for their action, the following resolution to amend Article Three (3) of the Articles of Association of The American National Bank of Omaha, Nebraska.

Be It Resolved, That, Whereas the first sentence of Article Three (3) of the Articles of Association of The American National Bank of Omaha, Nebraska, reads as follows, to-wit:

"The Board of Directors shall consist of nine (9) share-
401 holders", That the same be, and hereby is amended so that it shall read "The Board of Directors shall consist of seven (7) shareholders".

Yours very truly,

HENRY F. WYMAN, Cashier,"
THOS. L. KIMBALL, Pres.

Attest: Henry F. Wyman, Cas.

402 EXHIBIT "7".

Special Directors Meeting,
Held December 21st, 1895.

Present: Mr. Thos. L. Kimball
" Wm. Baird
" Chas. C. George
" M. Levy
" A. R. Dufrene
" A. U. Wyman

The minutes of the meeting held December 10th 1895 were read and approved—

It was moved and seconded that the following resolution be adopted;

Whereas, the officers of this Bank and the officers of Union Natl. Bank of Omaha, Nebraska, have negotiated and agreed upon the sale of this Bank to the Union Natl. Bank of the business and assets of this Bank on the terms and conditions embodied in the agreement of which the following is a copy, to-wit:

"Agreement

This Indenture Witnesseth: That the American National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the first part, has and by these presents does hereby agree for the considerations hereinafter expressed to

and with Union National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the second part, as follows, to-wit:

First: The party of the first part hereby agrees to sell and assign and does hereby sell and assign to the second
403 part the business of the party of the first part, its cash on hand, office furniture and fixtures and such of its bills receivable as the party of the second part on examination may be willing to take as cash without recourse on the party of the first part.

Second: The party of the second part hereby agrees to purchase and does purchase from the party of the first part the business of the party of the first part, cash on hand, office furniture and fixtures, and such bills receivable as the party of the second part may be willing to take as cash on examination of the same without recourse on the party of the first part and to pay the party of the first part for said office furniture and fixtures the sum of Three Thousand Seven Hundred and Fifty ($3750.00) [—] and to assume the liabilities of the party of the first part to its depositors and on account of its bills payable and to liquidate the remaining assets of the party of the first part which may not be taken and received as cash by the party of the second part without charge or expense to the party of the first part, except such Court charges and attorney's fees as may be found necessary, and that such liquidation shall be conducted under the direction of Thomas L. Kimball or such other person as may be agreed upon on behalf of the stockholders of the party of the first part, it being understood and agreed that said Kimball or his successor shall represent in said liquidation the stockholders of the party of the first part, and shall receive, hold and use the proceeds of the assets of the party of first part as trustee of the parties hereto for the mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all
404 necessary court charges and attorney's fees attending said liquidation shall be incurred under the direction of the said Kimball or his successor.

Third: In consideration of the above agreement of the party of the second part, the party of the first part hereby agrees to sustain and pay one-half of the loss and expense which the party of the second part may sustain on account of removal from its present quarters by reason of its unexpired lease on its present place of business, and one half of the loss which the party of the second part may sustain on the sale of its office furniture and fixtures, which furniture and fixtures are agreed upon at the present price and value of Three Thousand Seven

Hundred and Fifty ($3750.00) Dollars, and the party of the first part further agrees to guarantee and does hereby guarantee the party of the second part against any and all loss on account of assuming the liabilities of the party of the first part as aforesaid. And to this end the party of the first part agrees to execute and deliver to the party of the second part its three promissory notes of equal sums for the amount of liabilities which the party of the second part may assume after crediting the full amount of cash on hand and bills receivable and other assets which may be accepted by the party of the second part on examination, which notes shall draw interest from date at the rate of six per cent per annum payable quarter annually, and be payable in one, two and three years from date respectively, and shall be non-negotiable. And in case of non-payment of any of said notes when due, the whole of said principal sums of all of said notes and accrued interest shall thereupon become due.

465 And as further security to the party of the second part the party of the first part agrees to sell and assign and does hereby sell and assign to the party of the second part all of its assets which may remain after the selection therefrom by the party of the second part heretofore mentioned, including [al.] its bills receivable, stocks, bonds, personal property of every kind and all real estate and interests therein or liens thereon with the understanding and agreement that the party of the second part shall have and hold said assets and properties subject to the right of said Thomas L. Kimball or his successor to collect and convert the same into cash for the uses and purposes hereinbefore expressed.

And it is further agreed that the party of the first part may pay and have credited on said notes at any time prior to maturity any sums of money of Five Hundred ($500.00) Dollars and upwards, provided the sums so paid shall be in even hundreds.

Witness the names and corporate seals of the parties hereto this 21st day of December, A. D., 1895.

Now Therefore resolved, that the foregoing agreement be and the same is hereby ratified and confirmed and that the officers of this Bank be and are hereby authorized and directed to execute said agreement and carry the same into effect for and on behalf of this Bank, and that the officers of this Bank be and are hereby authorized to execute and deliver to the Union National Bank the notes of this Bank in the sums which

may be required to comply with the terms of the foregoing agreement.

406 The Resolution was unanimously adopted.

THOS. L. KIMBALL, Pres.

Attest: Henry F. Wyman, Cas.

407 EXHIBIT "8".

Regular Directors Meeting,
Held January 14th, 1896.

Present: Mr. Thos. L. Kimball
Mr. A. R. Dufrene
Mr. A. U. Wyman
Mr. M. Levy
Mr. Chas. C. George
Mr. Wm. Baird

On motion, Mr. Geo. G. Wallace, Mr. Alex G. Charlton and Mr. James I. Woodward were unanimously appointed Judges of Election to conduct the election to be held at the meeting of the stockholders on January 14th, 1896.

The meeting adjourned.

Attest: THOS. L. KIMBALL, Pres.

Henry F. Wyman, Cas.

408 EXHIBIT "9".

Annual stockholders meeting Held January 14th, 1896.

The following shares were represented in person:

10	shares	by	Wm. Baird
9	"	"	Alex G. Charlton
10	"	"	Alex. G. Charlton, Secty
10	"	"	James H. Conrad
75	"	"	A. R. Dufrene
5	"	"	John N. Frenzer
15	"	"	Chas. C. George
10	"	"	Thos. L. Kimball
50	"	"	Morris Levy
50	"	"	McCague Bros.,
287	"	"	John L. McCague
10	"	"	Thos. H. McCague
10	"	"	Chas. F. Manderson
6	"	"	C. W. Morton
56½	"	"	W. S. Poppleton
2½	"	"	Jas. I. Woodard
75	"	"	Geo. G. Wallace
58½	"	"	Henry F. Wyman

The following shares were represented by proxy:

	15	shares	by	M. C. Acheson by Alex G. Charlton
	5	"	"	J. J. Brown, Jr. " Randall K. Brown
	10	"	"	E. C. Brownlee by Alex G. Charlton
	25	"	"	R. L. Brownlee By Geo. G. Wallace
	22½	"	"	Rufus B. Bullock By John L. McCague
[409]	18	shares	of	Caroline Carpenter by John L. McCague
	7½	"	"	Viola Coffin by Jas. I. Woodard
	15	"	"	Peter Frenzer by John N. Frenzer
	5	"	"	Sarah A. Glenn by John L. McCague
	25	"	"	John H. Hawkins by Geo. G. Wallace
	10	"	"	Geo. Marples by John L. McCague
	75	"	"	E. M. Morsman by Alex G. Charlton
	1	"	"	Geo. Morton by C. W. Morton
	2	"	"	Jas. H. Morton by C. W. Morton
	1	"	"	Mary E. Morton by C. W. Morton
	615	"	"	National Bank Building Company of America by John C. Wharton
	10	"	"	T. R. Neal by J. H. Conrad
	15	"	"	J. E. Patrick by Robt W. Patrick
	10	"	"	W. A. Page by John L. McCague
	20	"	"	Wm. Wallace by John L. McCague
	10	"	"	A. U. Wyman by Geo. G. Wallace
	917			

In person	748. 3-4	
By proxy	917	
Total	1665 3-4	(In red ink)

For Report of Judges of Election see page 258)

On motion Mr. Thomas L. Kimball was elected chairman and Mr. Henry F. Wyman Secretary of the meeting. The minutes of the stockholders meeting held January 8th, 1895 were read, and on motion of General Manderson, seconded by Mr. Levy were approved.

410 Thirty days notice having been given the stockholders that the resolution would be offered, it was moved by Mr. Wharton and seconded by Mr. Dufrene that the following resolution be adopted;

Be It Resolved, That Whereas the first sentence of Article Three (3) of the Articles of Association of the American National Bank of Omaha, Nebraska, reads as follows, to-wit:

"The Board of Directors shall consist of nine (9) shareholders." That the same be and hereby is amended so that it shall read:

The Board of Directors shall consist of seven (7) shareholders."

It was moved by Mr. Patrick and seconded by General Manderson that the resolution offered be laid upon the table for the present.

The question was put, but the chairman was unable to determine the vote. General Manderson said he hoped that before any other business was brought before the meeting there would be made to the stockholders a statement of the circumstances which led up to the agreement with the Union National Bank. The Agreement entered into between the Directors of the American and Union National Banks was read.

Mr. Kimball made a statement of the conditions that confronted the American in December 1895 and the necessity for promptly taking advantage of the opportunity that offered whereby the depositors of the bank would be protected, the immediate obligations of the bank paid and time given the bank to realize on its assets.

411 General Manderson said that after investigation he was satisfied with the action of the Directors. Mr. Robert Patrick expressed himself to the same effect.

Mr. Dufrene, Mr. Baird, Mr. Levy, Mr. Wharton, Mr. Charlton and Mr. Thos. H. McCague were of the opinion that, under the circumstances the action of the Directors was for the best interests of the stockholders. Mr. Wharton, seconded by Mr. Dufrene moved to adopt the resolution, heretofore offered and withdrawn, to amend the Articles of Association. On motion of Mr. Patrick the Secretary was unanimously instructed to cast the ballots of the shares represented in favor of the Resolution.

The Secretary cast the ballots of the meeting for the resolution, which was announced carried.

Mr. Wharton moved that the meeting proceed to ballot for Directors. On motion of General Manderson, seconded by Mr. Patrick, the Secretary was unanimously instructed to cast the ballots of the shares represented for Thos. L. Kimball, A. R. Dufrene, Morris Levy, Wm. Baird, A. U. Wyman, Chas. C. George and Geo. G. Wallace for Directors.

The Secretary cast the ballots of the meeting for Messrs. Thos. L. Kimball, A. R. Dufrene, Morris Levy, Wm. Baird, A. U. Wyman and Chas. C. George and Geo. G. Wallace for Directors.

On motion of Mr. Baird seconded by Mr. Charlton the following resolution was adopted, the only vote in the negative being that of Mr. W. S. Poppleton who represented 56¼ shares.

412 Resolution.

Resolved, That the Directors of the American National Bank of Omaha, Nebraska, be, and hereby are instructed to take action looking to the liquidation required by law.

The meeting adjourned.

THOS. L. KIMBALL,
Chairman.

Attest:
Henry F. Wyman, Cas & Secty.

413 EXHIBIT "10".

Special Directors Meeting.

Held January 17th, 1896.

Present: Mr. Thos. L. Kimball
Mr. A. R. Dufrene
Mr. M. Levy
Mr. Wm. Baird
Mr. Chas. C. George

On motion Mr. Kimball was elected Chairman and Mr. Henry F. Wyman Secretary of the meeting.

All Directors elect present qualified as Directors and the meeting proceeded to the election of officers.

On motion the secretary was unanimously instructed to cast the ballots of the Directors for Mr. Thos. L. Kimball for President, for Mr. A. R. Dufrene for Vice-President and for Mr. Henry F. Wyman for Cashier.

The Secretary cast the ballots of the Directors for Mr. Thos. L. Kimball for President, for Mr. A. R. Dufrene for Vice-President and for Mr. Henry F. Wyman for Cashier.

It was unanimously decided to leave vacant the position of Assistant Cashier, and to defer to a subsequent meeting the appointment of committees.

The minutes of the directors meetings held December 21st 1895 and January 14th, 1896 were read and approved. On motion of Mr. Baird, seconded by Mr. Dufrene, the following resolution was unanimously adopted:

Resolved, That a meeting of the shareholders of The American National Bank of Omaha, Nebraska, be called for the 25th

day of February 1896 for the purpose of considering
414 and voting upon the following Resolution, to-wit:

Resolved, That The American National Bank of Omaha, Nebraska, be placed in voluntary liquidation under the provisions of Sections 5220 and 5221 U. S. Revised Statutes, to take effect the 25th day of February, 1896. And that Thos. L. Kimball be, and hereby is appointed the agent and trustee of the shareholders of said Bank to effect such liquidation.

The meeting adjourned.

THOS. L. KIMBALL, Pres.

Attest:

Henry F. Wyman, Cas.

415 EXHIBIT "11".

The American National Bank,
Omaha, Nebraska.

January 17th, 1896.

To The Shareholders:

At the Annual Meeting of the Shareholders of this Bank held January 14th, 1896, It was

"Resolved, That the Directors of The American National Bank of Omaha, Nebraska, be and hereby are instructed to take action looking to the liquidation required by law".

Acting under these instructions the Directors have this day called a meeting of the Shareholders for the 25th day of February 1896, for the purpose of considering and voting upon the following:

Resolution:

"Resolved, That The American National Bank of Omaha, Nebraska, be placed in voluntary liquidation, under the provisions of Sections 5220 and 5221, U. S. Revised Statutes, to take effect the 25th day of February 1896, and that Thos. L. Kimball be, and hereby is, appointed the agent and trustee of the Shareholders of said Bank to effect such liquidation."

It is desired that each Shareholder be personally present or represented by proxy, at the called meeting. No Officer or Director of the Bank can act as proxy, and it is suggested that Mr. John L. McCague or Mr. Alex G. Charlton are eligible to vote your stock.

Requesting your presence or representation at the meeting we remain

Respectfully,

416 THOS. L. KIMBALL
A. R. DUFRENE
M. LEVY
A. U. WYMAN Directors.
WM. BAIRD
CHAS. C. GEORGE
GEO. G. WALLACE

This day, Jan. 20th, 1896 copies of this notice were mailed or delivered to all stockholders.

HENRY F. WYMAN, Cas.

417 EXHIBIT "12"

Report of the Judges of Election.

(in red ink)

(Copy) Omaha, Jan. 14th, 1896.

Dear Sir: We the undersigned, a committee of the stockholders of The American National Bank of Omaha, appointed by the Board of Directors of said Bank to conduct the annual election of Directors of said Bank certify and report to the Cashier of said Bank that on the fourteenth day of January 1896, between the hours of three and five in the afternoon of said day after due notice had been given to the stockholders of said Bank, they did hold said election and as a result thereof, there were cast the following ballots for Directors for the year next ensuing, Sixteen hundred sixty-five and 3-4 (1665 3-4) votes for each of the following: Thos. L. Kimball, Morris Levy, William Baird, A. U. Wyman, A. R. Dufrene, Chas. C. George and George G. Wallace, being a majority in interest of the stockholders of said Bank.

Therefore, we declare the election as Directors of The American National Bank of Omaha, Nebraska, for the ensuing year, the following named stockholders, Thomas L. Kimball, William Baird, A. R. Dufrene, Morris Levy, A. U. Wyman, George G. Wallace, Chas. C. George.

G. G. WALLACE,
To Henry F. Wyman, Cashier ALEX G. CHARLTON,
American National Bank, J. I. WOODARD,
Omaha, Nebr. Judges of Election.

Attest: Henry F. Wyman, Cas.

418 EXHIBIT "13".

Special Directors Meeting.

Held February 25th, 1896, for the purpose of appointing Tellers to receive and report the votes to be cast at the Special Meeting of the stockholders called for February 25th, 1896.

Present: Mr. Thos. L. Kimball
Mr. A. R. Dufrene
Mr. M. Levy
Mr. Wm. Baird and
Mr. A. U. Wyman.

On motion of Mr. Levy seconded by Mr. Baird, Mr. J. H. Conrad and Mr. C. W. Morton were unanimously appointed such Tellers.

The meeting adjourned.

THOS. L. KIMBALL, Pres.

Attest: Henry F. Wyman, Cas.

419 EXHIBIT "14".

Special Stockholders Meeting.

On February 25th, 1896, the Stockholders of The American National Bank met in the parlors of said Bank in pursuance of the notice appearing on page 257 of these records.

The meeting was called to order by Mr. Thos. L. Kimball, President of the Bank.

On motion of Mr. E. M. Morsman, seconded by Mr. A. R. Dufrene, Mr. Thos. L. Kimball was unanimously elected Chairman and Mr. Henry F. Wyman Secretary of the meeting.

Mr. Wm. Baird moved the adoption of the following

Resolution:

"Resolved, That The American National Bank of Omaha, Nebraska, be placed in voluntary liquidation, under the provisions of Sections 5220 and 5221, U. S. Revised Statutes, to take effect the 25th day of February 1896, and that Thos. L. Kimball be, and hereby is appointed the agent and trustee of the Shareholders of said Bank to effect such liquidation."

Mr. A. R. Dufrene seconded the motion of Mr. Baird. The motion for the adoption of the Resolution was put by the

Chairman to a vote of the stock represented, and the vote was as follows:

Votes represented in [perfor]. For the resolution,

Number Shares	Voted by
15	Acheson M. C.
10	Baird Wm.
10	Brownlee E. C.
9	Charlton Alex G.
20	Charlton, Secy. Alex G.
10	Conrad James H.
[420] 75	Dufrene A. R.
10	Kimball Thos. L.
50	Levy Morris
50	McCague Bros.,
287	McCague John L.
25	McCulloch James H.
75	Morsman E. M.
5	Morton C. W.
50	Smith Howard B.
2¼	Woodard James I.
10	Wyman A. U.
58¼	Wyman Henry F.
772½	

Votes represented by proxy. For the Resolution:

Number of Shares.	Owned by	Voted by
5	Brown, Jr. J. J.	R. K. Brown
22½	Bullock Rufus B.	John L. McCague
18	Caroline Carpenter	John L. McCague
7½	Coffin Viola	Jas. I. Woodard
9¾	Crowell Anna C.	John L. McCague
5	Flack Arthur H.	John F. Flack
50	McClellan R. H.	John L. McCague
5	McConnell Trustee, F. R.	John L. McCague
10	Marples Geo.	John L. McCague
2	Morton Jas. H.	C. W. Morton
1	Morton Mary E.	C. W. Morton
615	National Bk Bldg. Co.	John C. Wharton
10	Neal T. R.	J. H. Conrad
1½	Robinson Emily J.	Alex G. Charlton
10	Speer John	John L. McCague
75	Wallace Geo. G.	Howard B. Smith
20	Wallace Wm.	John L. McCague
867¼		

421 Votes represented in person. Against the Resolution—

Number of shares	Voted by
56¼	Poppleton W. S.

Total stock represented and voted as follows:

For Resolution, in person	772½
For resolution by proxy	867¼
Total for resolution	1639 3-4
Against Resolution	56¼
Total shares voted	1696

Total Capital stock of the bank 2000 shares
Two-thirds necessary to adopt resolution 1333 1-3 "

It appearing that more than two-thirds of the Capital stock had voted in favor of the Resolution, the Chairman declared the Resolution adopted.

Thereupon the meeting adjourned.

THOS. L. KIMBALL, Chairman.

Attest:

Hneyr F. Wyman, Secy.

422 EXHIBIT "15".

Copy of Teller's Report.

Omaha, Nebr. Feby 25th, 1896.

Henry F. Wyman, Cashier,
American National Bank,
Omaha, Nebr.

Dear Sir:—

We, the undersigned, a committee of the stockholders of The American National Bank of Omaha, appointed by the Board of Directors of said Bank to act as Tellers at the meeting of the stockholders held this day, certify and report to the Cashier of said Bank, that on this 25th day of February 1896 after due notice had been given to the stockholders of said Bank, a meeting of the stockholders was duly held, and as a result thereof there were cast in favor of the following resolution sixteen hundred thirty-nine and 75-100 (1639 75-100) votes; Seven hundred twenty-two and 50-100 (722 50-100) votes being represented in person and nine hundred seventeen and 25-100 (917 25-100) votes being represented by proxy, and against the following resolution, Fifty-six and ¼ (56¼) votes.

Total votes 1696

Resolution.

"Resolved: That The American National Bank of Omaha, Nebraska, be placed in voluntary liquidation under the provisions of sections 5220 and 5221 U. S. Revised Statutes, to take effect the 25th day of February 1896, and that Thomas L. Kimball be and hereby is appointed the agent and trustee of the Shareholders of said Bank to effect such liquidation."

423 Two-thirds of the stock having voted in favor of the above resolution, we hereby declare the same adopted.

(Signed) CHARLES W. MORTON,
JAMES H. CONRAD,
Tellers.

Attest:
Henry F. Wyman, Cas.

424 EXHIBIT "16".

Special Directors Meeting.

Held February 27th, 1896.

Present: Thos. L. Kimball
A. R. Dufrene
A. U. Wyman
Wm. Baird

The minutes of the meeting held January 17th and 25th 1895 were read and approved.

On motion the Cashier was instructed to subscribe his name and affix the seal of the Association to the following:

"Certificate for Voluntary Liquidation

No. 4087.

American National Bank,
Omaha, Nebr. Feby. 27th, 1896.

To the Comptroiler of the Currency,
Washington, D. C.

Sir:—

It is hereby certified in pursuance of Sections 5220 and 5221 of the Revised Statutes of the United States, that at a meeting of the stockholders of The American National Bank, located at Omaha, in the State of Nebraska, duly notified and held pursuant to law and the Articles of Association of said Bank at the office of said Association at Omaha, Nebraska, aforesaid on the 25th day of February, 1896, it was voted by the stockholders of said Association, owning two-thirds of its stock, that said Association go into liquidation and be [cloased].

425 In Testimony Whereof, I have, by instruction of the Board of Directors of said Association hereto subscribed my name and affixed the seal of said Association at Omaha, Nebraska, aforesaid, the day and year above written.

Cashier.

Notice.

The American National Bank located at Omaha in the State of Nebraska is closing up its affairs. All note holders and others creditors of said Association are therefore notified to present the notes and other claims against the Association for payment.

Cashier.

"Dated Omaha Neb. Feb 27th 1896".

On motion the following Resolution was unanimously adopted.

Resolved, That the Comptroller of the Currency be and he is hereby authorized to withdraw $50,000.00 U. S. Bonds, deposited with the Treasurer of the United States by this Bank to secure circulation and described as follows:

$50,000.00 of the Loan of 1907 Four Per Cent Consols, and that the First National Bank of the City of New York be, and is hereby authorized to sell, assign and transfer the same and to appoint one or more attorneys for that purpose.

THOS. L. KIMBALL, Pres.

The meeting adjourned,
Attest: Henry F. Wyman, Cas.

426 EXHIBIT "17".

(Letter from American National Bank to Comptroller of the Currency under date of April 23rd 1896."

Thos. L. Kimball, President,	Henry F. Wyman, Cashier
A. R. Dufrene, Vice-President	E. C. Brownlee Asst. Cashier.

The American National Bank,
Omaha, Apr. 23, 1896.

Hon. James H. Eckels,
Comptroller of the Currency,
Washington, D. C.

Sir: Our directors have not yet received from you formal consent to the liquidation of this bank, in accordance with the decision reached by you in our interview of the fifteenth in-

stant, and I have been instructed to ask of you such formal consent, in order that it may be incorporated in the banks records.

Respectfully yours,

(Signed) HENRY F. WYMAN, Cashier.

427 EXHIBIT "18".

(Letter from Comptroller of the Currency to American National Bank under date of April 27th, 1896."

Treasury Department

Ao-

Office of the Comptroller of the Currency.

Washington, D. C., April 27, 1896.

Address reply to "Comptroller of the
Currency" Washington, D. C.
V. H. C.
E. S.
Mr. Henry F. Wyman,
Cashier, American National Bank,
Omaha, Nebraska.

Sir: Your letter of 23rd has been received, in further reference to the liquidation of your association.

You are respectfully advised that the papers have been placed on file, my approval being given to the liquidation of the bank.

Very respectfully,
JAMES H. ECKLES, Comptroller.

(Stamped)
American Nat'l Bank,
Apr 30 1896
Omaha, Nebraska.

428 EXHIBIT "19".

(Duplicate Proof of Publication, Omaha Mercury, June 26, 1896, Publisher's Fee $6.85.

Duplicate

Proof of Publication.

U. S. America
The State of Nebraska
Douglas County,
City of Omaha—ss.

Charles E. Duffie being du'y [sowrn], deposes and says that he is the Editor of the Omaha Mercury, a weekly newspaper, printed, published and circulated every Friday in the City of

Omaha, Douglas County, and State of Nebraska, and that said Notice attached hereto was published in said Omaha Mercury in each issue thereof for ten consecutive weeks, the first date being April 24, 1896, and the last date of publication being June 26, 1896.

That said newspaper has a bona fide circulation of more than 200 copies weekly, and has been printed and published at Omaha, within said County, for more than 52 successive weeks prior to the publication of said notice.

That said Omaha Mercury was, during the time, in general circulation in the County of Douglas and the State of Nebraska.

Signed CHAS. E. DUFFIE.

Subscribed in my presence and sworn to before me this 26 day of June 1896.

[Seal] ERNEST I. YOUNG,
Notary Public in and for
Douglas County, Nebraska.

429 Notice. The American National Bank, located at Omaha in the State of Nebraska, is closing up its affairs. All note holders and others, creditors of said Association, are therefore hereby notified to present the notes and other claims against the Association for payment.

HENRY F. WYMAN, Cashier.

Dated Omaha, Nebraska, February 27, 1896.

(Stamped)
Paid The Omaha Mercury.

430 EXHIBIT "20".

Publishers Certificate, American Banker.

July 8th, 1896.

Publisher's Certificate.

Anthony Stumpf being duly sworn, states, that he is a member of the firm of Stumpf & Steurer, publishers of The American Banker, a weekly financial publication, published in New York City, and further states that the attached Notice of Liquidation was published for the period of two months from April 29 to June 29 1896, in the above named periodical as required by law. ANTHONY STUMPF.

Sworn and subscribed to before me, this the 8th day of July 1896. FRANCES G. HAINES,
Notary Public.
N. Y. Co.

Notice:—The American National Bank located at Omaha, in the State of Nebraska, is closing up its affairs. All note-holders and others, creditors of said association, are therefor hereby notified to present the notes and other claims against the association for payment.

HENRY F. WYMAN, Cashier.

Dated, Omaha, Neb. Feb. 27th, 1896.

431 EXHIBIT "21".

Treasury Department

Office of the Comptroller of the Currency Ao

L & M Washington, D. C. July 20, 1896.

Address Reply to Comptroller of the Currency, Washington, D. C.

HV E. S.

Mr. Henry F. Wyman,
Cashier, American National Bank
Omaha, Nebraska.

Sir:—

Your letter of the 13th instant has been received in reference to the publication of notice concerning the liquidation of your bank, in the American Banker of the City of New York.

You are respectfully informed that proof of publication was received from the publisher on the 9th instant.

JAMES H. ECKELS, Comptroller.

(Stamped)

American Nat'l Bank
Jul 23 1896
Omaha, Nebraska.

432 EXHIBIT "22".

Acknowledgment of Deposit in Liquidating Account.

Treasury of the United States,

T E R Washington May 4 1896.

$45,000

Sir:—

For a deposit of lawful money of the United States, made under Section 5222 of the Revised Statutes for the redemption of your circulation, I have this day credited your Bank in

Liquidating Redemption Account Forty-five thousand Dollars, and have issued this acknowledgment in duplicate.

Respectfully yours,

J. K. MELINE,
Assistant Treasurer U. S.

Cashier

American National Bank
Omaha, Nebr.

(Stamped)

American Nat'l Bank,
May 7 1896
Omaha, Nebraska.

433 EXHIBIT "23".

Annual Stockholders Meeting.

Held January 8th, 1895, at three o'clock in the afternoon.

Stock to the aggregate amount of 1515½ shares were represented and voted as follows:

No. Shares.	Owned by
50	W. L. McCague
10	E. C. Brownlee
75	A. R. Dufrene
75	G. G. Wallace
15	C. C. George
15	Peter Frenzer
5	J. N. Frenzer
25	J. H. McCulloch
6	C. W. Morton
58¼	H. F. Wyman
10	Wm. Baird
287	Jno. L. McCague
50	M. Levy
50	McCague Bros
10	Thos. L. Kimball
10	A. G. Charlton, Secy.
751¼	

The following shares were represented by proxies:

No. Shares	Owned by	Voted by
50	Robt. McClellen	W. L. McCague
3 3-4	Frank Graham	C. C. George
5	J. J. Brown, Jr.	Wm. L. McCague
10	A. U. Wyman	G. G. Wallace
25	R. L. Brownlee	W. L. McCague

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18	Caroline Carpenter	W. L. McCague
5	A. H. Flack	John F. Flack
600	Nat. Bank Bldg. Co.	W. L. McCague
25	Wm. Minot Jr.,	W. L. McCague
22½	R. B. Bullock	W. L. McCague
764½		
Total votes cast		1515½

The judges of Election Mess. Geo. G. Wallace and Charles W. Morton made a report to the Cashier of which the following is a copy.

Omaha, January 8th, 1895.

"Dear Sir:—

We the undersigned, a Committee [od] the stockholders of the American National Bank of Omaha, appointed by the Board of Directors of said Bank to conduct the annual Election of Directors of said Bank, would certify and report to the Cashier of said Bank, that, on the 8th day of January 1895, at the office of said Bank in Omaha, between the hours of three and five o'clock in the afternoon of said day, after due notice had been given to the stockholders of said Bank, by publication, they did hold said election, and, as a result thereof, there were cast for the following persons to act as Directors of said Bank, for the year next ensuing:

Thos. L. Kimball	1515½ votes	Wm. Baird		1515½
A. U. Wyman	1515½ "	John L. McCague		1515½
E. M. Morsman	1515½ "	W. A. Page		1515½
Morris Levy	1515½ "	Chas. C. George		1515½
		A. R. Dufrene		1440½

being a majority in interest of the stockholders of said Bank.

435 Therefore we declare the Election as Directors of the American National Bank of Omaha, Nebraska, for the ensuing year, the following named persons:

Thos. L. Kimball
A. U. Wyman
E. M. Morsman
Morris Levy
Wm. Baird
John L. McCague
W. A. Page
Chas. C. George
A. R. Dufrene

GEO. G. WALLACE,
CHARLES W. MORTON,
Judges of election.

To Henry F. Wyman, Cashier,
American National Bank, Omaha, Nebraska.

The Directors elect were notified of their election and a meeting was called for Saturday afternoon, January 12th at three o'clock for the purpose of organizing the new Board.

THOS. L. KIMBALL,
Pres.

Attest:
Henry F. Wyman, Cas.

436 EXHIBIT "24"

Regular Stockholders Meeting.

On January 12th 1897 the stockholders of the American National Bank met at No. 1504 Dodge Street in Omaha, Nebr., in pursuance of notice. The meeting was called to order by Mr. A. R. Dufrene, vice-president of the bank. On motion of Mr. Baird, seconded by Mr. George Mr. Dufrene was unanimously elected chairman of the meeting.

On motion of Mr. George, seconded by Mr. Wharton, Mr. Henry F. Wyman was unanimously elected secretary of the meeting.

The minutes of the stockholders meetings held January 14th 1896 and February 25th, 1896, were read and approved. The following report was read and on motion of Mr. George, seconded by Mr. Baird, was received and ordered [apread] upon the records.

Omaha, Nebr.
Jan. 12th, 1897.

To the stockholders:

I beg to submit for your consideration a condensed statement comparing the condition of the American National Bank on December 21st 1895 (its last day of active business) with the condition on January 1st, 1897.

Liabilities	Dec. 21, 1895	Jan. 1, 1897
Capital	200,000.00	200,000.00
Circulation	45,000.00	
Deposits	239,947.69	
Bills Payable	50,000.00	184,000.00
Bills Rediscounted	4,880.64	
Overdraft with Union National Bank		99.85
	539,828.33	384,099.85

437 Resources:		
Loans and Discounts	307,080.51	245,918.54
Overdrafts	3,000.59	
U. S. Bonds	50,000.00	
Premium on bonds	5,500.00	
Stocks, Securities, Claims, [etx.]	47,099.91	51,394.63
Furniture and Fixtures	7,500.00	
Real Estate owned	43,282.42	54,980.97
Cash, Sight Exchange and Cash Items	62,085.50	
Cash Item (in litigation)		5,000.00
Five Per cent Fund	2,250.00	
Profit and Loss	12,029.40	26,805.71
	529,828.33	384,099.85

It will be observed that aside from Capital Stock and Circulation, the Liabilities of the Bank have been reduced from $294,828.33 to $184,000.00.

The cash expenditures since the Bank entered upon liquidation have aggregated $60,294.23 as follows:

Payment of Liabilities incurred prior to Liquidation	$22,799.90
Payment of Expenses " " "	4,985.99
Payment of principal and interest to Union Nat. Bank	22,815.40
Payments since Liquidation to carry Real estate	4,738.65

Payment of expenses since Liquidation as follows:

Salaries	$2,639.96	
Attorneys fees	85.55	
Advertising, postage, fitting up vault expenses to Washington, etc.,	439.92	
One-half rent old Union Nat. Bank quarters	1,788.86	4,954.29
		$60,294.23
The collections have aggregated		60,194.38
Overdrawn account		99.85

It has been deemed advisable not to endeavor to enforce many claims by recourse to law, both on account of the expense [anf] the probability of a longer delay in collecting.

The remaining assets of the Bank are largely based upon real estate securities, and under existing conditions liquidation proceeds slowly. In order to work out the best results they

should continue to have close attention until such time
438 as the real estate can be sold and the other assets turned into cash.

Respectfully submitted,

HENRY F. WYMAN, Cashier.

Approved: THOS. L. KIMBALL, Trustee.

On motion of Mr. Wharton, seconded by Mr. Baird, the Secretary was instructed to cast the ballots of the shares represented for Mr. Thos. L. Kimball, Mr. A. R. Dufrene, Mr. Wm. Baird, Mr. M. Levy, Mr. A. U. Wyman, Mr. Chas. C. George and Mr. Geo. G. Wallace for Directors for the ensuing year. The Secretary cast the ballots of the shares represented for Mr. Thos. L. Kimball, Mr. A. R. Dufrene, Mr. Wm. Baird, Mr. M. Levy Mr. A. U. Wyman, Mr. Chas. C. George and Mr. Geo. G. Wallace for Directors for the ensuing year, who were declared duly elected.

The shares represented and voted were as follows:

Represented in person

10	by Wm. Baird
9	" Alex G. Charlton
20	" Alex G. Charlton, Secy.
10	" James H. Conrad
75	" A. R. Dufrene
15	" Chas. C. George
50	" McCague Bros.
10	" Thos. H. McCague
[439] 25	" J. H. McCulloch
6	" C. W. Morton
75	" Geo. G. Wallace
2¼	" Jas. I. Woodard
58¼	" Henry F. Wyman
365½	Total

Represented by proxy:

15	of M. C. Acheson by Alex G. Charlton
25	R. L. Brownlee by Geo. G. Wallace
18	Caroline Carpenter by John C. Wharton
10	Thos. L. Kimball by Alex G. Charlton
287	John L. McCague by Alex G. Charlton
50	R. H. McClellan by J. H. McCulloch
10	Geo. Marples by Thos. H. McCague
forwarded, 415	
75	of E. M. Morsman by John C. Wharton
625	" National Bank Bldg. Co. by John C. Wharton

10	John Speer by J. H. McCulloch
20	Wm. Wallace by John C. Wharton
11¼	Meade C. Williams by Alex G. Charlton
10	A. U. Wyman by John C. Wharton
1166¼	Total
365½	shares represented in person
1166¼	" " by proxy
1531¾	Total shares represented

The meeting adjourned

A. R. DUFRENE, Chairman.

Attest: Henry F. Wyman, Cas & Secy.

440 COPY OF EXHIBIT "25".

The undersigned, owners of the number of shares of the Capital Stock of the American National Bank of Omaha, set opposite our respective names, hereby ratify and confirm the action of the Directors of The American National Bank of Omaha in entering into and executing a certain agreement between said American National Bank and The Union National Bank of Omaha, a copy of which agreement is hereto attached:

Names.	Number of Shares.
National Bank Bldg. Co. of Amer. by John C. Wharton, Atty in fact.	Six hundred and fifteen shares.
Thos. L. Kimball	Ten Shares.
Wm. Baird	Ten shares.
E. C. Brownlee	Ten shares.
Alfred R. Dufrene,	Seventy-five Shares.
Anna C. Crowell, By Thos. H. McCague, Atty. in fact.	Nine 3/4 Shares
Thos. H. McCague,	Ten Shares.
McCague Bros.	Fifty Shares.
John L. McCague	Two hundred Eighty-seven shares.
William L. McCague By John L. McCague, Atty. in fact,	Fifty Shares.
E. M. Morsman,	Seventy-five Shares.
Alex. G. Charlton,	Nine Shares.
Alex. G. Charlton, Secy.	Ten Shares
J. J. Brown, Jr.,	Five Shares.
Henry F. Wyman,	Fifty-eight and 1/4 Shares.

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Names.	Number of Shares.
Morris Levy	Fifty Shares.
A. U. Wyman,	Ten Shares.
George G. Wallace,	Seventy-five Shares.
M. C. Acheson	Fifteen Shares.
Charles W. Morton,	Six Shares.
James H. Morton,	Two Shares.
Mary E. Morton,	One Share.
George Morton,	One Share.
Jas. H. Conrad,	Ten Shares.
Chas. C. George,	Fifteen Shares.
T. R. Neal,	Ten shares.
George Marples,	10.

(Attached to said Exhibit is Agreement, copy of Exhibit "1" in this case.)

442 EXHIBIT "27".

Minutes of adjourned Regular Meeting held Aug. 8, 1898, in the office of the Bank.

Present W. W. Marsh, A. R. Dufrene, W. A. Smith, J. H. Macomber, G. W. Wattles.

Moved by G. W. Wattles, seconded by W. A. Smith, that the President and Cashier be, and are hereby, authorized to execute on behalf of the Bank the following assignment:

"For value received The Union National Bank hereby sells and assigns to Sumner Wallace, the note hereto attached of the American National Bank dated Dec. 23rd, 1895, on which there is a balance of principal of Thirty-seven thousand and seven hundred and sixty-five dollars due and unpaid, including in this sale and assignment the proportionate interest which is represented by said note in the assets of the American National Bank which are held by Thomas L. Kimball, Trustee, as security for said promissory notes and the other notes of the American National Bank under the agreement between said American National Bank and Union National Bank dated 21st day of December, A. D. 1895.

Witness the name and corporate seal of the Union National Bank this 8th day of August, 1898."

Above motion carried unanimously.

Moved, seconded and carried that meeting adjourn.

J. W. THOMAS, Cas.

443 EXHIBIT "28".

Minutes Regular Meeting of Board of Directors held August 2, 1898, in the banking office.

No quorum present.
Meeting adjourned to Monday Aug. 8, 1898.

J. W. THOMAS, Cas.

444 EXHIBIT "29".

Minutes of Special Meeting of Board of Directors of this Bank held on April 21, 1898.

Present W. W. Marsh, T. L. Kimball, A. R. Dufrene, G. W. Wattles, J. H. Macomber.

Minutes of last meeting read and approved.

Whereas, at a meeting of the Board of Directors of this Bank held on Jan. 6th, 1898, at which the following Directors were present, to-wit, W. W. Marsh, T. L. Kimball, G. W. Wattles, A. R. Dufrene, W. A. Smith, J. H. Macomber and Chas. Marsh, a motion was made and carried that the following resolution be voted, to-wit:

"Whereas, The Union National Bank holds the assets of the American National Bank as security for notes of said American National Bank, which is insolvent, and is desirous of obtaining payment of same: and

Whereas, certain stockholders in said American National Bank have agreed, or may hereafter agree, to subscribe an amount equal to the par value of stock held by them respectively, to be paid Thomas L. Kimball, Trustee, to be held by him in furtherance of this purpose:

Voted, That this bank agrees to and with each and all of said subscribers so paying the full amounts to which they would respectively be liable upon assignment, that no advantage shall be taken of this as a voluntary prepayment before judgment, but, that upon judgment being obtained, this Bank will release or cause to be released, the stockholder from
445 all liability thereunder, and doth hereby guarantee each and every subscribing stockholder making payment in full, against any second payment, or any part of any second payment, under any judgment which may be obtained:

Voted, That said notes be assigned to Sumner Wallace, in order that proper legal proceedings may be undertaken in his name to forward the mutual interests of this Bank, and of Thomas L. Kimball, Trustee, representing such subscribers, to the end that this Bank shall be first paid, and that the sub-

scribers shall receive from the proceeds of such assets, and from sums collected from other stockholders in the American National Bank who fail to subscribe, the surplus:

Voted, That it is understood that the trustee holding such subscriptions and proceeds, may at discretion withhold from payment to this Bank from time to time, such reasonable sums as may be needful to meet fixed charges, such as taxes, interest on prior liens, &c., and to prevent a forced sacrifice of the assets in his hands."

Resolution.

And it appearing that by oversight a record of said meeting has not been made, therefore, moved by J. H. Macomber, and seconded by Thos. L. Kimball, that the record of said meeting be now entered upon the records of the Bank—

Carried. Upon motion made, seconded and carried meeting adjourned.

J. W. THOMAS, Cashier.

446 EXHIBIT "30, page 1.

Omaha, Neb., October 8th, 1899.

Statement of the condition of The American National Bank, of Omaha, from the commencement of liquidation to date.

	Dec. 21, 1895.	October 8, 1899.
LIABILITIES.		
Capital,	200,000.	200,000.
Circulation,	45,000.	
Deposits,	239,947.69	
Bills Payable,	50,000.	167,765.
Bills Re-discounted	4,880.64	
	$539,828.33	$367,765.00
RESOURCES.		
Loans & Discounts,	307,080.51	205,847.32
Overdrafts,	3,000.59	
U. S. Bonds,	50,000.	
Premium on Bonds,	5,500.	
Furniture and Fixtures,	7,500.	
Stocks, Securities, Claims, &c.,	47,099.91	50,027.58
Real Estate,	43,282.42	64,397.43
Cash, sight exchange and cash items,	62,085.50	2,219.52
Five Per Cent. fund,	2,250.	
Profits & Loss,	12,029.40	45,273.15
	$539,828.33	$367,765.00

COLLECTIONS.		
To January 1st 1897,—not itemized,		60,194.38
Since above date:—Loans & Discounts,	24,234.82	
Interest & Discounts,	3,295.36	
Real Estate, Sale of,	2,843.48	
" " Rents, &c.,	3,516.90	
Profit & Loss	1,806.84	
Cash Item (Previously in litigation)	4,000.	
City Warrants,	342.82	
Stocks, Securities &c. (Judgments)	1,411.70	57,158.39
" " (Bonds &c.)	15,706.47	
		$117,352.77
EXPENDITURES.		
Liabilities prior to liquidation,	22,799.90	
Expenses " " "	4,985.99	
Principal Union Nat. Bank, Notes 1-2 & 3,	33,235.	
Interest " " " to March 23, 1897,	14,095.40	
Real estate, acquired,	7,284.30	
" taxes,	3,994.57	
" Interest on mortgages, including monthly payments on property in Griffen & Smith's Addition,	8,256.98	
Repairs, etc.,	361.05	
Expenses, Salaries,	4,639.96	
Half rent old quarters of Union,	3,538.82	
Attorneys fees,	2,114.93	
Court costs,	678.04	
Advertising, Printing & Postage,	544.17	
Sundries,	89.98	
Profit & Loss,	8,514.16	
Cash on hand,	2,219.52	
		$117,352.77

447 EXHIBIT "30", page 2.

Loans and Discounts.

American Tailors,	230.98
Bartlett, M. S.	225.
Barton, W. P.	212.17
Blackburn, W. C.	467.
" T. W.	275.
Brewster, C. M.	23.
Bell, E. E. J.	3,000.
Brennan, W. P. & Ruth H.	500.
Bush, E. J.	15.
Beebe, S. S. & Cath. H.	64.
Brownlee, T. C. & H. R. Vandecar.	5.00
Barkalow, N. E. & S. D.	650.
" N. E.	3,436.
Bartlett, E. C. & M. J.	5,495.25
Berlin, R. S.	2,593.22
Benawa & Co.,	875.
Clark, A. M. & W. F.	25.70
Collins, D. J.	50.
Charlton, Paul	350.
Cooley & Stutzer,	3,959.57
Cooley, Laura J. & A. H.	5,995.
Charlton, Alex G.	3,408.80
Cushing, Luther S.	5,447.03
Cutler, F. E.	325.

Chamberlain, H. L.	229.	
Colby, C. J.	135.	
Cooper, Geo. M.	150.	
~~Clapp, Chas. E. & W. N. Williams,~~	~~776.~~	settled
Curtis, S. S. & C. E.	1,200.	
" S. S.	2,500.	
" S. S.	90.	
" S. S. & F. J. Sackett,	2,639.48	
" " " " " "	274.50	
Doud, H. A.	250.	
Darling, F. K.	25.	
"	390.	
Dumont, J. H.	2,000.	
Dawson Brick Co.,	3,700.	
Elgutter, C. S.	400.70	
"	3,000.	
Fawcett, Jacob	2,500.	
"	39.	
Flack, Jno. F. & Carrie J.	10,907.20	
Flack Co. Jno. F.	3,276.37	
Fitch, Wm.	1,680.	
Ford & Charlton Music Co.,	1,249.74	
Fitch, Wm. Bay, J. P. & A. H. Cooley,	550.	
Faist, Louis,	600.	
Gould, H. B.	305.	
" M.	385.	
" M.	47.35	
" M. & Geo. S.	350.	
" M. & Wilson S.	450.	
Gaston, J. Q.	55.05	
Gadd, E. T. and W. L. McCague,	75.	
Gratton, W E. & Ella E.	586.	
Gridley, F. P.	95.	
Grebe, Hy. & Wm. Coburn,	44.24	
" Hy. & Louis,	22.28	
Hunt, G. J.	2,250.	
Hoopes, Willis I.	1,500.	
Herdman, R. E.	217.	
Holbrook, B.	2,093.57	
"	1,673.55	
Hale, O. H. P.	800.	
Haman, C. F. & H. F.	1,310.	
Henderson, Ida M. and Hallet H.	2,200.	
Harrison, C. F. & Chas. A. Goss,	478.20	
Forward	91,025.95	

448 EXHIBIT "30", Page 3.

L. & D. No. 2, Br't Forward,	91,025.95
Hanighen, J. J.	203.84
Interior Land & Im. Co.,	1,657.50
Joplin, Geo. A.	84.25
Johnson, Anthony & J. A. Lovegren,	263.80
Irvine, Frank	250.
Jessen, Kirstine	10.
Johnson, F. B.	1,700.
Johnson, Chas. & Elizabeth,	75.
Knight Bros. & Barnes,	390.64
Knox, E. B.	265.35
Kennedy, J. G.	75.
Lees, Stewart D.	31.50
Limback, H. F.	184.
Lobeck Mdse. Co., B. Holbrook,	560.51

Lewis, J I.	506.99	
"	750.	
McMahon, E. R.	1,958.66	
Miller, W. R.	34.30	
Mallender, J. P.	515.	
Mo. Val. Grain Co. W. B. & J. B. Christian,	331.60	
Monitor Hard Plas'er Co., A. K. Walla,	500.	
Marshall, J. L.	125.	
Miller, H. C. & W. A. Page,	1,300.	
McCague, J L.	7,000.	
" "	3,260.61	
"	2,500.	
McCague Bros.	2,200.	
"	17,643.38	
McCague, W. L.	2,786.88	
"	10,120.51	
Mathews, H. W. & E. M.	2,000.	
Nevin, J. E.	125.	
~~Ours, N. B.~~	~~17.50~~	bankruptcy
Olsen, Theo.	783.	
Osterhoudt, B. H. Spring Wagon Co.,	297.75	
Powers, H. E.	1,789.10	
Parrotte, J. H.	322.	
"	105.20	
Parmer, Mark M.	200.	
Platter, Thos. H.	340.	
Powell, C. N.	234.	
Parkins, J. N.	176.75	
Patterson, D. C.	1,148.25	
Power, Chas. M.	475.	
Ramsey, O. N.	608.38	
Rice, J. L. & A.	2,200.	
Roeder, M. L.	2,000.	
Risdon, M. R.	2,100.	
Riall, Ernest	2,972.13	
"	689.43	
Smeaton, D. D.	175.	
Snell, Mrs. G. & Geo.	16.46	
Seward, E. E. & F. L. Blumer,	36.	
Seavey, W. S.	70.	
Stratton, C. E.	1,136.99	
"	231.24	
Squires, C. E.	9,233.52	
"	2,000.	
Thomas, D. L.	380.	
Van Kuran, A. J. & Amelia J.	150.	
" "	1,825.	
White, A. K.	4,000.	
Williams, W. N. Clapp, C. E. & F. Irvine,	515.	
Walker, Geo.	55.35	
Walworth, C. H.	3,500.	
Wright, E. M.	80.11	
Wyman, H. F.	240.	
Forw'd	190,938.43	

449 **EXHIBIT "30", Page 4.**

L. & D. No. 3 Br't Forward,		190,938.43
Wilson, T. B.		48.
White, W. T.		20.
Whitney, Addis M. Trustee,		8.740.

Wallace, Geo. S. & Essie,	2,500.
"	1,000.
"	414.98
"	106.56
"	600.
"	304.05
"	100.
" & F. S. Blayney,	1,000.
Zittle, J. D.	73.
Williams, Jno. A. & J. Reed,	2.
	$205,847.22

450 EXHIBIT "30", Page 5.

Statement of Stocks, Securities, Claims, &c.

JUDGMENTS.

C. T. Taylor & Thos. F. Boyd,	2,151.17
M. C. Hamilton, (Grahm)	168.67
W. H. Eldridge,	211.34
E. Fleishman, et al.	517.09
W. B. Musser & Adam Snyder,	48.50
A. A. (Phil E.) Winter,	305.52
W. F. Doolittle & J. H. Baldwin,	1,277.70
R. I. Mattice,	2,067.52
James Pape,	119.21
Geo. J. & John Paul,	857.77
Geo. J. Paul,	261.50
F. F. Williams,	2,470.
E. B. & Pauline Chapman,	596.42
E. P. Dridley & M. Morrison,	106.03
Phillip P. Mergen,	1,046.91
Paul Platz,	326.11
Briggs Place Bldg. Association,	1,917.49
J. C. & S. J. Walsh,	108.26
John A. Smiley & S. A. Crowe,	47.66
W. J. McEathron,	50.
J. C. Leeney & Paul Platz,	51.22
American Asphalt Co. (Ainscow & Caspar)	804.15
H. M. Morrow & W. H. Williams,	568.44
" & H. M. Williams	459.52
W. N. Williams,	949.
I. E. Burdick,	178.43
Patrick Land Co. & Est. W. H. Craig,	3,991.64
Broken Bow Roller Mill Co. S. J. Lonergan,	1,051.92
Apollo Club, W. H. Holbrook & I. M. Treynor,	[illegible] settled
Ed. Ainscow,	487.
H. E. Cole & W. D. Youlen,	176.85
E. H. Duncan,	41.27
Archer Eke,	2,419.55
Thos. M. Greeley & Co.	78.
Jas. R. Meikle,	198.
"	110.83
F. R. McConnell,	105.
"	105.83
"	169.60
J. I. Nichols,	4,835.58
N. B. Ours,	1,233.39
A. A. Raymond,	197.10
F. C. Shafer,	39.58
F. V. Wasserman & M. C. Beemer,	2,537.75
J. J. Wilkinson,	2,262.74
Jno. T. Williams, & G. F. Wittum,	52.50
	$37,609.01

BONDS.

5 Series D. McCague Invt. Co. $1,000. each, on books at		$2,500.	
STOCKS.			
50 shares	Nat'l Bank Bldg. Co. of America, on books at	5,000.	
4 "	Omaha Printing Co.	100.	
50 "	Galena Axle Grease Co. Galena, Ill.	~~1,000.~~	sold
5 "	Omaha Fair & Speed Association, at $25.	.....	
		$9,100.	

CLAIMS.

Tax certificate on lots 1, 2, 3, 4, & 5 Rockford Place, Doolittle & Badlwin Collateral,	$ 72.61
Tax certificate on lots 31, 32 & 33 Blk. 3 W. I. Selby's 1st. Addn. Ainscow Collateral,	9.36
Insurance Premium paid on policy of E. C. Bartlett,	187.50
Do. Do.	175.80
Do. Do.	187.50
Do. Do.	175.80
Insurance policy of N. G. Brown, paid up value $750.	10.00
	$818.57

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EXHIBIT "30", page 6.

REAL ESTATE.

Ambler Place,	Lots 9, 10 & 12, Blk. 32 and lots 15 & 17 Blk. 39 with three seven houses.
Windsor Place Extn.	Lots 14 & 15.
West Side,	Lots 23 & 24 Blk. 27
So. Omaha,	Lots 7 & 8 Blk. 121
Bowling Green,	Lots 22, 23 & 24 Blk. 4
Boyd's Addn.	Lot 6 Blk. 20
Hickory Place,	W. 1/2 lot 29
Albright's Annex,	Lot 5 Blk. 8
Prospect Place,	E. 67' of So. 32' Lot 1 Blk. F. with small house.
E. V. Smith's Addn.	Lot 8 Blk. 10 with dilapidated house, Mtge. $1500.
Swift Place, So. Omaha.	Lots 1 & 2 Blk. 1
Dundee Place,	Lots 14 & 15 Blk. 106 Lot 15 Blk. 124
Grand View,	Univided 1/3 interest Lots 17 & 18 Blk. 448
Murphy's Addn. 38 lots	
Kountze Place,	Lots 1 & 2 Blk. 17 with 10 room house and barn, Mtge. $4000.
Griffen & Smith's Add.	Lot 2, Mtge $12,000. (about $9,000. still due)
Creighton Heights,	Lots 10 Blk. 7 and 3 & 4 Blk. 9
Steele & Woods Add.	Lot 24 Blk. 3
Potters Addn.	Lot 24 Blk. 1
Hoppes Bonanza,	Lot 7 Blk. 1
Mt. Pleasant,	Lot 15 Blk. 2
Paddock Place,	Lot 2 Blk. 6
Lobeck's Sub.	Lots 1 to 12 Blk. 2 and 8 to 18 Blk. 3

LANDS.

Keith Co. Neb.,	S. W. 1/4 Sec. 19-14-40
Douglas Co. Neb.,	Undivided one-half interest in 23 acres with mill and machinery in dilapidated condition and small house, also 1/2 interest in E. 1/2 N. E. 1/4 Sec. 10-15-10 and S. W. 1/4 N. W. 1/4 Sec. 11-15-10, near Waterloo, Neb.
" "	Sub. lot 20 tax lot 5 in Sec. 15-15-13, Mtge. $4,000.

Sheridan Co. Kans.	N. 1/2 Sec. 33-8-26
Reynolds Co. Mo.,	S. W. 1/4 Sec. 4-33-3
Dallas Co. Iowa,	S. 1/2 N. W. 1/4 & N. 1/2 S. W. 1/4 Sec. 15 and N. E. 1/4 Sec. 16-81-29, Mtge. $5,000. Also part of S. E. N. W. and part N. E. S W. Sec. 10-81-29 with Brick plant. Leased with option of purchase.

452 EXHIBIT "31"

Omaha, Neb., January 8th, 1900.

Supplemental Statement of the condition of The American National Bank of Omaha, from October 8th, 1899, to and including January 7th, 1900.

Total Liabilities, January 7th, 1900		$367,765.00
Total Resources " " "		$367,765.00
Total Collections as per statement of October 8th, 1899		117,352.77
Since above date to Jan. 8th, 1900, on account		
of Loans & Discounts	239.	
Interest & Discounts	168.85	
Real Estate, Rents	734.68	1,142.53
		$118,495.30
Total Expenditures as per statement of October 8th, 1899		117,352.77
Since above date to Jan. 8th, 1900, on account		
Real Estate, Taxes	77.07	
Salaries	241.93	
Sundries	1.22	
Cash on hand, (Total $3,041.83)	822.31	1,142.53
		$118,495.30

In the statement of Loans & Discounts the account of H. F. & C. F. Haman should be credited with $30., and C. E. Clapp's note with $200. These are the only changes that should be made in the detailed statement rendered.

453 EXHIBIT "32".

Statement of Collections and Expenditures made by James Burness, Trustee of the American National Bank, since the date of his appointment (January 8th, 1900) to and including October 31st, 1901).

COLLECTIONS:	
Cash on hand January 8th, 1900	3,041.83
Loans & Discounts	22,284.17
Interest & Discounts	3,728.73
Real Estate, act Rents	971.25
" " " Sales	10,980.47
" " " Taxes rebated	138.53
Stocks Securities, Claims, etc.,	15,669.08
Received on account of 10 shares of stock of American Nat'l Bank, held by the late Thos. L. Kimball,	1,000.
	$57,814.06
EXPENDITURES:	
Paid Union National Bank on notes	19,000.
Real Estate, act. taxes,	834.35
Paid J. E. Markel, his proportion of rents collected from Waterloo property	324.27

Court Costs	199.27
Attorneys fees	375.
Settlement of Steinberg case,	500.
Advertising, Postage, &c.,	27.40
Sundries, Ins. Abstracts, Commissions, &c.,	172.43
Salary of Trustee	1,633.25
Stocks, Securities, Caims, &c.,	7,979.90
Profit & Loss	21,040.47
Cash on hand Oct. 31st, 1901	3,977.72
	$56,064.06
Charged Loans & Discounts	1,750.
	$57,814.06

The following notes held in the "Loans & Discounts" account have been settled by compromise or adjustment or wiped out by the parties taking advantage of the bankrupt law:

T. W. Blackburn	275.	
C. M. Brewster	25.	
S. S. Beebe	64.	
Chas. E. Clapp	566.	
S. S. & C. E. Curtis	1,200.	
S. S. Curtis	2,500.	In Stocks, Securities, Claims, act. Judgt.
" "	90.	
" " & F. J. Sackett	2,639.48	
" " " "	274.50	
Dawson Brick Co.	3,000.	
Ford & Charlton Music Co.	1,249.74	
J. Q. Gaston	55.05	
C. F. Harrison & C. A. Goss	478.20	
J. J. Hanninghen	203.64	
K. Jessen	10.	
[454]		
J. P. Mallender	515.	
N. B. Ours	17.50	
W. S. Seavey	70.	
C. H. Walworth	3,500.	
H. F. Wyman	240.	$1,200 of this has
Flack Co.	3,276.37	has been paid and
J. F. Flack	10,907.20	balance will be charged to Profit & Loss after payment of $300 more

In the statement of claims, stocks, securities, &c., the following have been settled by compromise or advantage of the bankruptcy act taken:

W. H. Eldridge,	211.34
E. Fleishman, et al (Steinberg)	517.09
R. I. Mattice	2,007.52
E. E. & Pauline Chapman	596.42
Briggs Place Bldg. Assn.	1,917.49
H. M. Morrow & W. H. Williams	568.44
" "	459.52
Patrick Land Co. Est. W. H. Craig	3,991.64
Broken Bow Roller Mill Co. & S. J. Lonergan,	1,051.92
Apollo Club, W. H. Holbrook, et al,	99.25
E. H. Duncan	41.27
F. R. McConnell	105.
"	105.83
"	169.60
N. B. Ours	1,233.39

BONDS:
McCague Invt. Co. Bonds have been sold.

STOCKS:
The 50 shares of Galena Axle Grease Co., stock has been sold.

The following Real Estate has been disposed of:
Lot 12 Block 32 Ambler Place.
Lots 7 & 8 Block 121 So. Omaha.
Lots 1 & 2 Kountze Place, known as the Fawcett property.
E. 30 feet ex No. 10 feet Lot 28 Millard & Caldwell's Addition W. ½ of N. E. ¼ Sec. 7-4-21 in Furnas Co. Neb.
Undivided ½ interest in about 23 acres and ½ interest in E. ½ N. E. ¼ Sec. 10-15-10 and S. W. ¼, N. W. ¼ Sec. 11-15-10 near Waterloo, Neb.

There has been added to the Real Estate, Lot 2 Block 7 Ackerman Place.

455 Page 1 of EXHIBIT 33.

Statement of Cash Collections, Disbursements &c.

456 Pagt 2 of "EXHIBIT 33".

Statement of Cash Collections From the Commencement of Liquidation Dec. 23rd, 1895 to and Including October 31st 1901.

Not itemized (This item is composed of collections			12989 85
Loans & Discounts from overdrafts, Banks & Bank-			36502 95
Interest ers & Misclaneous remittances)			8672 30
Overdrafts			118 56
United States Bonds, Realized		54375 00	
Less Circulation		45000	9375
Five per cent Fund		2250 00	
Less assessment for expenses	75 84		
" Duty Jan. 1 to May, 1896	150	225 84	2024 16
Stocks, Securities, Claims etc.,			
" Packers Natl. Bank, Galena Axle Grease Co.,			
& Rocky Mounty Bell Telephone Co.			4012 75
Bonds, Holdrege Water Bonds & Coupons McCague			
Invt. Co. Bonds			15550 97
Claims, Walrath Interest, Om. Claring House Assn.			
$250 &c.			1095 65
Judgments			2232 08
City Warrants			2058 62
County "			112 45
Furniture & Fixtures			3750
Real Estate, Sale of			10197 10
" " Rents, Dallas Co. Ia. farm			6051 28
Kountze Place, Prospect Place			
Crescent Park &c.			
Sale of Brick Plant			182 97
" " " " Gas Pipe			135 35
Rents & Sale of old Mill Waterloo property			893 16
Sale 2nd mortgage Lot in Deer Park Add.			350
Fire loss, Crystal Ice Co. and $99			1090 65
Rebates credited to expense act.			317 71
Banks & Bankers			611 15
Bankers Bldg. & Loan Assn.			570
Sale maps, plat book & old books			11 20
Redick Park Bldg. Assn.			22 64

Costs rebated or collected	14 05
Attorneys fees "	12 50
Revenue Stamps	2 50
Taxes rebated	186 18
Profit & Loss, Riall goods, Robinson chattels, Biggar Quit claim, Nichols Stock, &c., &c.	2191 65
Costs retaibed Dec. 23-95 less $15 expense to Seward	1485
Certificate of Deposit, Union Natl. Bank	4000
Thos. L. Kimball estate, act. 10 shares of stock	1000
To balance	14 72
	$127744 15

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Statement of Disbursements From the Commencement of Liquidation Dec. 23rd, 1895, to and Including October 31st, 1901.

Union National Bank on act. of Liabilities assumed which were not included in notes aggregating $201,000	17832 16	
Interest to Dec. 23, 1895 in cert. of Deposit Public Funds, Bills Payable & adjustment of interest on Bills Receivable to be taken by Union	1250 80	
Overdrafts with correspondents	2245 76	
Checks of Depositors drawn against accounts not placed on books of Union	1425 96	
Unclaimed balances	45 22	
		$22,799.90
Duty on circulation to Jan. 1, '96 to adjust 79	225 79	
Readjustment of two loans, ours & Herdman	50 52	
Attorney's fees	2589 98	
Sundry expenses, Clearing House to 12-23-95 Towel Co., etc.	38 85	
Salaries from Dec. 15, 1895	268 86	
Court costs	405 63	
Personal tax	1119 71	
Rents of American Quarters to Dec. 23 '95	286 65	
		4,985.99
Union Natl. Bank, including Interest	66330 40	
Half Rent old quarters Union & $25 land of Crystal Ice Co.	3563 82	
Examinng land Boone Co. Nebr.	12 30	
Storage & Drays &c. Riall goods	74 86	
Cleaning, Turning, Stools &c. for Ford & Co. Music	67 95	
Ice Co. Electric Light Co. (Co's Pianos)	3 70	
Refunded to Anna M. Biggar	10 00	
Collecting Holdrege bond coupons	10 62	
Stenographic Services, Depositions &c.	65 30	
Exchange 1.52, Express 7.35, car fare, calender Pads 2.85, Meals 1.50, Protest fees 3.10, Dumont claims 50 cts.	16 82	
Omaha Clearing House to Dec. 23 '95 Fitting up Vault case	41 20	
Robinson's chattels	114 50	
Expenses to Washington, Lincoln & Perry, Ia	96 16	
Hire horse & buggy $2.00, appraisals 7.50	9 50	
Telegrams	7 93	
Cleaning vault, Prospect Place	5 20	
Publishing notices, annual meetings, Printing & stationery	145 56	

Insurance	69 15	
Repairs to Toft, Kountze & Prospect Place property	221 64	
Salaries, including Trustee's $1632.50	6514 39	
Commissions on sale Real estate	85	
Abstracts to "	106 20	
Sidewalks Brick	183 52	
Taxes "	4707 44	
Interest on mortgages including payments to Bankers Bldg. & Loan Assn. on Griffin & Smith's property, also payment of $500 mortgage on Prospect Place property	90007 70	
Ford.	119256 75	

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Brot. Ford.		119256 25
Attorneys Fees		2640 93
Steinberg case		500
Court costs		724 71
Recording Deeds, Leases &c.		29 55
Postage & Revenue stamps		130 34
Unclaimed balance, F. R. McConnell		83 33
Paid J. E. Markel his one-half of Rents &c., from Waterloo property	400 82	
Cash on hand in Union Natl. Bank	3977 72	
		$127744 72

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The Following Payments Have Been Made to the Union National Bank, Either on Account of Principal or Interest.

1896.			
Jany	27		3000
Feby	29		3000
Mch	10		1000
"	27		1005
	31		1965 96
May	5		6000
	16		4000
June	23		2844 44
1897			
Feby	12		2010
	17		1005
Apl	16		2250
	"		2010
	"		1005
	"		8235
May	12	(Cert of Dep)	4000
1899			
Mch	16		4000
1900			
Feby	8		3000
May	12		10000
Nov	7		5000
1901			
Jany	2		1000
			$66330 40

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Attorneys in Account with American National Bank

1895				
Dec	30	H. B. Smith	700	
		"	333	33
1896.				
Jany	11	" Franklin Sav Bk v Nichol	327	20
	27	Hall & McCulloch, Holdrege bond suit	1000	
May	26	H. B. Smith on act.	150	
June	6	R. I. January, Colo & Youlen case	15	
	2	H. B. Smith act Lobeck	10	
	29	W. H. Thompson, Am. Asphalt case	25	
Dec	23	Goss & Ross Paul et al Smith Enewold	55	
	"	J. R. Lindsay, Limbeck	11	
	30	H. B. Smith act fees	100	
1897				
Jany	20	D. L. Thomas, Bradley case	5	
Feby	15	H. B. Smith act services	400	
Mch	4	Wharton & Baird foreclosure services	25	
Apl	19	H. B. Smith	1032	60
July	1	"	100	
Augt	16	W. H. Thompson, Om. Coffin Mfg. Co.	25	
Sept	15	H. B. Smith	386	78
Oct	22	W. D. Beckett, Referee Festner case	75	
Dec	23	W. H. Thompson, Murphy case	50	
1898				
Jany	30	R. I. January, Youlen case	15	
May	17	D. L. Thomas " "	5	
1899				
Jany	13	Nichol, J. I. Lewis case	10	
1900				
Sept	10	T. W. Blackburn, Graham, Walworth Cooley, et al	275	
Apl	30	W. H. Thompson, Steinberg case	100	
			$5230	91

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INTEREST.

1895				
Dec	27	Union Natl Bk. Cert of Dep. to 12-23-95	329	58
		County funds	293	24
		City "	7	94
		State "	1	83
		Bank Balances	4	55
		Wm. Minot	147	20
		Lawrence Minot	20	61
	28	Bills Payable, N. Y.	252	
	"	Bills Payable Wm. Minot	61	63
	"	Rebate to Union Natl. Bank act. notes sold them	201	75
	"	Bkrs. Bldg. & Loan Assn. Dues & Int. (on Griffin & Smith's Lot)	190	
	30	Int. Mort. E. V. Smith's Add. B. Reed Co.	45	
1896.				
Jany	2	" Am. Exc. Bk. chge. Dec	11	55
	6	" 1st Natl. Bk. N. Y. "	8	58
	11	Bills Payable, Chicago	8	33
	"	Renewal note W. W. Mace	1	75
	25	Bkrs. Bldg. & L. Assn. Dues & Int.	190	
	28	Cert. Dep. No. 6279 Om L & Tr. Co.	150	

Mch	2	& 31 Bkrs. Bldg. & L. Assn. Dues & Int.	570	
	&	4-28 3 mos.		
"	26	Int. on $5000 Mort. Dallas Co. Ia, land	300	
May	4	" 4000 " Kountze Place	120	
	"	Mort $500 & Int Prospect Place	525	
June	3			
June	6	Bkrs. Bldg. & L. Assn. Dues & Int.	380	
June	19	Int. on $1500 Mort. E. V. Smith's Addn.	45	
July	15	R. White Miller, Coll.		50
	"	Bkrs. Bldg. & Loan Assn. Dues & Int.	190	
Sept	2	R. White Miller, Coll.		28
Oct	17	Bkrs. Bldg. & L. Assn. Dues & Int.	190	
Dec	14	" " " " "	190	
Nov.	24	" " " " " "	190	
Oct	31	Int. on Mort. Kountze Place	120	
Dec	21	" " " E. V. Smith's Add.	45	
1897				
Mch	25	" " " Dallas Co. Ia.	300	
Feby	12	Bkrs. Bldg. & L. Assn. Dues & Int. 4 mos.	760	
Apl.	30	Int. on Mort Kountze Place.	120	
June	21	" " " E. V. Smith's Add.	45	
Augst	6			
Oct	11	Bkrs. Bldg. & L. Assn. Dues & Int. 5 mos.	950	
Nov	1	Int. On mort. Kountze Place	120	
"	24			
Dec	27	Bkrs. Bldg. & L. Assn. Dues & Int. (3 mos)	570	
"	20	Int. on Mort E. V. Smith's Add	45	
1898				
Jany	29	Bkrs. Bldg. & L. Assn Dues & Int.	570	
Mch	3	" " " " " "	131	98
"	28	" " " " " "	190	
April	30	" " " " " "	190	
Mch	29	Int. on Mort Dallas Co. Ia	300	
Apr	27	" " " Kountze Place	120	
May	28	Bkrs. Bldg & L. Assn. Dues & Int	190	
June	20	Int. on Mort. E. V. Smith's Add	45	
Augt	15	Bkrs. Bldg. & L. Assn Dues & Int.	190	
Nov	12	Int. on Mort. Kountze Place	120	
Dec.	21	" " " E. V. Smith's Add.	45	
1899				
Mch	29	" " " Dallas Co. Ia	300	
May	9	" " " Kountze Place	120	
	21	" " " E. V. Smith's Add.	45	
			$10,258	50

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TAXES.

1896.				
July	30	Personal city taxes	1119	71
Jany	6	1895 taxes Sheridan Co. ks	1	
	20	Lot 2 Blk. 17 Kountze Place, Spl. taxes	70	86
	21	1895 tax Keith Co. Neb land	8	22
	23	" " Dawson " "	20	32
		" " Furnas " "	9	92
	27	" Co. tax Swift Place Lots 1, & 2 B. 1	1	00
	30	" " " Waterloo property	45	16
		" " " Prospect Place	2	63
		" " " Millard & Caldwell's	5	75
		" " " Howell Plce.	4	19
		Marion "	4	79
		Albright Annex	1	25

		Boyds Add.	1 20
		E. V. Smith's Add	11 50
		Dundee Place	5 54
		Griffin & Smith's	43 11
		Creighton Heights	2 39
		Tax Lot 5, 15-15-13	8 98
		Kountze Plce.	28 38
		Grand View	1 68
		Murphy's Add.	33 97
Mch	10	" City tax Toft property	71 22
		" Co & St " " "	47 57
		1894 " " " "	54 86
		" & '95 tax So Omaha	63 55
		1895 Enewold property	3 77
	24	1892, 3, 4, & 5 Co. & St. taxes Bowling Green lots	4 55
	26	1895 tax Dawson Brick Co.	36 18
		½ " " Dallas Co. Ia. land	56 12
May	11	Sidewalk tax Hickory Place	1 14
		" " E. V. Smith's Add.	1 29
		" " Kountze Plce.	38
	8	Grading Lots 7 & 8 B 121 So. Om.	165 72
	19	Sidewalk tax Kountze Plce.	29
	"	1895 City tax Ambler Plce. 17 B 33	2 94
	"	Grading Pac. St. Hickory Plce.	22 16
July	29	1896 City tax Ambler Place	18 44
		" " " West side	4 10
		" " " Windsor Plce.	12 20
		" " " Boyd's Add.	2 05
		" " " Grandview	96
		" " " Hickory Plce.	4 10
		" " " Howell	7 17
		" " " Kountze Plce.	48 59
		" " " Griffin & S & other property	135
Augt	24	1868 Co. " Crystal Ice Co. prop.	1 88
Sept	25	1895 2d payment, Dallas Co. land	43 26
Dec	18	1892 3, 4 & 5 Co. & St. taxes Lobeck prop.	57 26
	"	1895 & 6 city taxes " "	4 42
"	31	1893 4, 5 & 6 city taxes So. Omaga	6 60
	21	1896 " " Albright's annex	1 50
	"	" " Lots 7 & 8 So. Omaha	16
	31	" taxes Sheridan Co. Ks land	33 63
		Ford.	2360 55

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TAXES.

1897		Brot Ford.	2360 55
Feby	9	Tax cert Lot 7 V. 1 Hoppes' Bonanza	9 69
	25	Repair tax E. V. Smith's Add.	6 57
	"	Pav. & Curb. tax 4th & 5th Installments Kountze Place	94 83
		" " 2nd. Install. Millard & Co. Add.	18 90
Mch	19	1896 Co. & St. Waterloo property	15 33
April	28	" " Swift Place	1 24
		" " Steel & Wood's	3 63
	29	" " Furnas Co	5 85
	30	" " Keith Co.	8 26
		" " Douglas Co.	191 11
June	21	" City Lots 7 & 8 So. Om Blk. 121	12 75
July	3	" Co. & St. Lot 8 " "	3 09
Augt	17	1897 Road tax Dallas Co. farm, Iowa	7 29
	24	" City taxes	347 74
	"	1896 " " Lots 15 & 17 Ambler Place	23 37
Sept	22	" Co. St. Dallas Co. farm	102 94

Oct	11	1897 City taxes Squires land	70	20
	14	Special taxes Millard & Cs. Add.		39
	"	" " Prospect Place		30
Dec.	4	Sidewalk tax E. V. Smith's Add	5	35
	"	" " "	3	15
	"	Paving 9 & 10 Instal. "	56	50
	6	1897 taxes Sheridan Co. ks.	30	18
	14	" " Lots 7 & 8 B. 121 So. Om.	14	24
	"	" " " 5 B. 8 Albright's Annex	1	34
	"	" " " 7 " 1 Hoppe's	1	34
1898				
Feby	26	½ 1897 " Dallas Co. farm	44	30
	"	" " " Brick plant, Ia.	2	34
Apl.	16	1897 Co. & St. Murphy's Add.	2	92
	27	" " Furnas Co. Neb.	6	06
	"	" " Keith Co. "	7	57
	"	" " Lots 1 & 2 B. 1 Swift Place	1	18
	"	" " " 24 B. 3 Steel & W Add.	2	01
	30	" " " Douglas Co. property	172	39
	"	" " " " "	9	00
	"	" " Squires land	24	45
	"	" " Waterloo "	22	81
Augt.	15	1898 Labor tax Dallas Co. Ia	7	04
July	19	1898 City taxes		
		Ambler Place Lots 9, 10, 12 B. 32, 15 & 17 " 39	20	
		Boyds Add " 6 B 20		85
		Creighton Hts. Lots 10 B. 7 & 3 & 4 B. 9	3	27
		Gd. View Und. 1-3 Lots 17 & 18 B. 448	8	40
		Griffin & Smith's Lot 2	79	63
		Howell Place Lot 37 N½ 38		73
		Marion Place " 7	2	30
		Millard & C Add. Lot E 30' ex No 10 of 28	12	12
		Hickory Place W½ Lot 29	1	82
		Kountze " Lots 1 & 2 B. 17	38	06
		Prospect Place S 32½ of E 67 Blk. F	10	54
		Ford.	3875	92

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1898		Brot. Ford.	3875	92
July	19	1898 City taxes		
		E. V. Smith's Add Lot 8 B. 10	16	
		West Side Ex " 23 & 24 B. 27	1	70
		Windsow Place " 14 & 15	7	03
		Potter's Add. " 24 B. 1	6	06
		Squires land S½ SW Swd 15-13	60	96
Sept	14	1897 taxes Dallas Co. Ia	38	72
	"	" " Brick plant	1	72
	15	Paving 3rd & 4th Instal. Millard & C.'s Add.	40	80
Dec.	14	1898 taxes Sheridan Co. Ks.	30	10
	27	" City " Lots 7 & 8 B. 121 So. Om	17	92
	"	" " " " 5 B. 8 Albrights Annex	1	63
	"	" " " "7 B. 1 Hoppe's Bonanza	1	96
	29	1897 & 1898 taxes Reynolds Co. Mo. SW¼ 4-33-3	7	18
1899				
Jany	6	Balance " " " "	2	43
Mch	13	½ 1898 " Dallas Co. Ia	43	42
	"	1898 " Lot 24 B. 3 Steel & Wood's Add	2	16

Apr	13	" taxes Furnas Co. land	4 96
	18	" " Keith " "	6 03
	26	" Co & St. Ambler Place	15 96
		" " Bowling Green	1 06
		" " Boyds Add	93
		" " Creighton Hts.	2 20
		" " Gd. View	46
		" " Griffen & Smith	40 47
		" " Marion Place	3 47
		" " Millard & Caldwell's	5 32
		" " Hickory Place	1 85
		" " Murphy's Add	26 79
		" " Kountze Plce.	26 59
		" " Prospect Place	2 43
		" " Potters Add.	3 12
		" " E. V. Smith's Add	8 67
		" " West Side	1 38
		" " Windsor Place Ext.	5 09
		" " So. Omaha	13 80
		" " Albright's Annex	1 23
		" " Dundee Place	4 29
		" " Hoppe's Bonanza	1 51
		" " Lobeck's Sub.	5 28
		" " Mt. Pleasant	84
		" " Squires land	23 13
		" " Waterloo "	28 01
		" " Swift Place	1 12
	15	" " Cheyenne land	49 32
May	11	Ure Redemption taxes Paddock Place lot	100
	29	1895 6, 7, 8 Co. & St taxes on above	20 54
	"	1894, 5, 6, 8 & 9 City taxes " "	66 51
June	30	1899 City taxes, Ambler Place	11 88
	"	" " " " " "	17 75
		" " " Boyds Add.	2 00
		Ford.	4659 72

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Dr. Taxes. In Account with American National Bank.

1899		Brot Ford.	4659 72
June	30	1899 City taxes Creighton Heights	3 00
		" " " Grand View	7 25
		" " " Marion Plce.	4
		" " " Millard & Caldwell's	15 25
		" " " Hickory Plce	4
		" " " Kountze Plce	51 75
		" " " Prospect Plce	11
		" " " Potters Add.	7
		" " " E. V. Smith's Add	16 25
		" " " West Side	2 75
		" " " Windsor Place Extn	10
		" " " Squires land	82 50
Augt	14	" taxes SW¼ 4-33-3 Reynolds Co. Mo.	3 42
Sept	26	Bal 1898 taxes Dallas Co. Ia farm	37 84
Dec	20	1899 Co & St taxes Sheridan Co. Ks	28 82
	27	" " City taxes So. Omaha	13 44
	"	" " " " " Albright's Annex	1 26
	"	" " " Hoppe's Bonanza	1 47
	2	" Co. & St. taxes Cheyenne, Wyo. land	32 08
1900			
Apl	5	Pav. & Curb. tax (1 Instal) Millard & C Add.	22 07
	"	1899 Co. & St. taxes " "	5 78
Mch	27	" " Dallas Co. Ia. farm	80 78

June	27	" " Waterloo property	37	49
	"	" " Squires land	25	36
	"	1900 City " "	92	40
July	16	Clk. Dist. Crt taxes (decree) Lot 2 Blk 6 Paddock Place	42	30
Oct	9	1900 Co. & St. taxes Reynolds Co. Mo. land	4	26
Dec.	12	I. S. Leavitt Bal. tax lot 3 Blk. 6 Paddock Place	7	70
	10	1900 taxes Cheyenne Wyo. land	30	96
1901				
Jany	1	" " Sheridan Co. Ks.	19	44
Feby	"	" " Waterloo land	39	52
	23	1-5th 1895 & 1896 Co. & St. taxes Squires land	17	15
	25	" 1896 City " "	14	89
	"	Clk. Dist. Crt. redemption 1-3rd Ure (Squires land) decree	62	21
	"	4-5ths 1895 City taxes, Squires land	94	61
	26	1-5 " " " " "	14	08
Apl	30	1900 Co & St. " " "	34	58
	1	1899 & 1900 Co. & St. taxes Lot 8 B. 121 So. Om.	17	96
	"	1900 City Taxes " "	11	75
	3	1899 & 1900 Co. & St. taxes Lot 7 B. 121	12	32
	"	1900 City taxes " " "	7	43
Feby.	19	Redemption of Tax. cert Dallas Brick Plant	137	18
			$5827	15

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Dr. Expenses. In Account with American National Bank.

1895			
Dec.	23	Exchange	10
	24	Telegram to N. Y.	50
	26	Exchange	40
	28	Wyman, on salary	15 75
	"	Protest fees, Rosenthal Am Ex Bk. Chgo	3 10
	31	Cole & Youlen Jdgt. costs of suit	15
	"	Express	10
	"	Salaries	445 52
1896.			
Jany	2	Exchange Chgo. 12-16	15
		Omaha Towel Co 12-16 to 1-1	1
		" Bee, publishing statement 12-26	7 75
		½ Rent Union Natl. Bk. Dec	28 90
		McCoy & Co	9 00
	3	Semi-annual tax on circulation	225
	"	Western Union Telegrams	2 13
	"	Postal "	32
	4	Exchange Rebate, Sherman & McC	15
	"	Expense on Holdrege Bonds	6 75
	6	Rent December	300
		Advertising W. Herald	2
	7	Brownlee Salary Jany 1-7	29 15
		Bullock " " 1-6	18
	11	Omaha Printing Co.	6 75
		Wyman act. salary	20
	"	Heller, Transcript Franklin S. Bk. v. Nichol	2 50
	"	Wilson " Am v Union	24 25
	21	Crystal Ice & Coal Co. Land Rent	25
	16	To Seward Faye suit, subpoena (in Nov. '95)	15
	"	Wyman salary	80
	"	Stenographic work Miss Smith	5 30
		Om. Clearing House Exp. 1895	18 87
	20	Postage	2
	21	Gate City Wood Works, vault case	26 60
	23	Robt. L. Whyte, meals	1 50

Feby	1	Rec. Lewis lease, Dallas Co. land		75
		" Deed Blair to Bk.	1	
	4	Hannigben, Plumbing Kountze Place	37	95
	15	Ins. prem. Millard & Caldwell house	12	
Jany	27	Wyman, salary	10	
Feby	3	McCoy & Co printing	4	75
	"	C. C. Claflin, stenographer	2	
	"	Postage	5	
	"	½ rent Union old quarters	145	83
	"	Wyman, salary	90	
	4	Rec. release Bowling Green lots		90
	"	Rec. J. I. Lewis lease		50
	5	Omaha Printing Co. Bal books	25	50
	15	suit A. M. & W. T. Clark costs	2	35
		Cooke & Co. Fitting keys	2	10
	18	Garrison, appraisal Riall prop.	2	50
	19	Wyman, salary	100	
		Ford.	1802	21

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1896		Brot. ford.	1802	21
Feby	20	John Bros. moving Riall goods	2	
	"	Powers (J. P.) costs Goldsmith suit	2	15
	24	Ayers & Wooden " Dawson Brck. Co.	12	05
	"	Advertising Robison sale	6	
	28	Costs bond, Om. Coffin Co.	10	90
		" " Am. Asphalt Co.	10	70
	29	Insurance prem. Crystal Ice prop.	36	
Mch	3	½ Rent Union old quarters	145	83
	6	Wyman salary	100	
		Sundry expenses, Exp. on currency .40, costs Youten 2.10, Labels Riall .30 costs Wms. & Reed 4.95	7	75
		Storage Riall goods	60	
		Westn. Union Telegrams	1	47
		Moving Riall goods	1	81
		McCoy & Co., Printing	1	
Feby.	29	Donation to Cent. U. P. Congl. (given to assist in raising the amount necessary to take up the obligation to Am. Natl. Bk.) Profit & Loss item		
Mch	2	Two Scrapers bought Robinson's sale	11	50
		1 team horses " "	53	
		1 " Mules " "	50	
	10	Abstract Toft prop.	7	35
		Rec. deed "	1	15
		Costs suit Wyoming Co.	12	
		Express on Currency		10
		Cert. copy Bill Patrick	2	35
		Dep. L. G. Charlton	10	
	12	Postage	5	
	16	Wyman, salary	100	
	31	" "	100	
	"	Gate city Wood Work shelves	2	50
April	4	H. B. Smith, Sundry costs	15	
	"	Telegrams	1	13
	11	⅓ rent Union old quarters	145	83
	"	Wyman's Washington trip	100	
	"	" salary	50	
	20	" "	50	
	21	Telegrams		65
		Postage	5	
	20	Wyman, salary	100	
		Costs suit v. Bruyn	20	25

May	2	" " " Burdick	2 35
		" " v Hazen	1 50
	4	½ Rent Union old quarters	145 83
	11	Costs Bk. v. Murphy	44 20
	15	Wyman salary	100
		Telegram	80
		Balance of duty (to adjust)	79
June	22	Prem Ins. Kountze Place	3 55
May	23	H. B. Smith, Sundry costs	25
	25	W. H. Thompson, Am. Asphalt Co costs	7 90
	28	Wyman salary.	100
		Ford.	3474 30

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Dr. Expense.

1896		Brot ford.	3474 30
June	2	John Bros. moving Riall goods	2 25
	"	Postage	5
	9	½ Rent Union old quarters	145 83
	"	Raymond estimate Ice houses	5
	15	Wyman, salary	100
	23	Storage, Riall goods	8
	29	Om. Mercury, Adv. liquidation notice	6 85
	"	Thompson, costs, Am. Asphalt Co. suit	7 85
	30	Wyman, salary	100
		Personal city taxes	
July	1	½ rent Union old quarters	145 83
	13	Stumpf & Steiner Liquidation notice	10
	15	Wyman, Salary	100
	23	Postage	10 90
		Costs v Nattinger	5
Augt	24	Plumbing Kountze Place	2 70
July	31	Wyman, salary	100
Augt	17	" "	100
	31	" "	100
	18	½ rent Union old quarters	145 83
Sept	2	" " " " "	145 83
	"	Omaha Ice Co. 1-4-96	1 50
	12	costs Int. Land & Inv. Co	15 95
	15	Wyman, salary	100
	29	costs, cases Nattinger, Perkins & Roeder	60 80
	30	Wyman, salary	100
Oct	8	½ rent old quarters	145 83
	12	costs Riall publication	12 25
	15	Wyman, salary	100
	26	costs Boteler v. Munk	48 23
	31	Wyman salary	100
Dec.	9	Crescent Park, Repts plumbing	18 30
	"	Kountze Plcs. " "	2 79
	23	Recording deeds	2 30
		" " Enewold prop.	1 25
		" Callahan Mtg.	20
		Abstract blanks	15
Nov.	14	½ rent Union old quarters	145 83
	16	H. B. Smith, sundry expenses	10
	"	Wyman, salary	100
	24	Advanced to Anna M. Biggar	5
	28	Wyman, salary	100
Dec.	3	" Expenses to Cheyenne	14 80
		½ rent Union old quarters	145 83
	8	Trans. judgt. Int. Land & Inv. Co	1
	10	H. B. Smith, sundry expenses	15
	12	Stools for F. & C M. Co. Pianos	12

	14	Postage	5	
	15	Wyman, salary	100	
	15 23	Tuning & cleaning pianos, &c.	17	10
	21	Bradley, Court costs	2	95
	23	Advance to Anna M. Biggar	5	
	30	Wyman, salary	100	
	"	½ Rent Union old quarters	145	83
	"	Painted sign Carelton (H. F. W.)	2	50
		Ford	6357	67

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Dr. Expense

1897		Brot ford	6357	67
Jany	14	Adv. F & C Music stock	10	55
	30	Abstract to White property	9	20
	5	costs McConnell suits (Powers J. Peace)	3	
		McCoy & Co, Printing	2	25
		suit Appollo Club 2.00		
	9	Sundry expenses, Plumb Mtg. 40	2	40
	15	Salary H. T. Wyman	100	
	19	Costs Bogart & Parrotte	4	40
	25	Wyman, Exp. to Lincoln (Mathew's note)	3	60
Feby	3	½ rent old quarters of Union	145	83
	"	F. & C. M. Co. Elect. light bill	1	67
	"	Salary, Wyman	100	
	4	West, moving pianos	6	75
	5	costs in Int. Land & Inv. Co.	18	25
	8	S. & Mueller 2 piano covers	3	
	12	January costs in Youlen case	24	03
	13	Postage	5	
	15	salary Wyman	100	
	18	Sundry expenses Rec. deed 1.10, Trans. Appollo .50 Bill S & Mc .75	2	35
	23	Hayden Bros. Pieno cover	2	10
	"	S & Mueller " "	4	
	"	H. S. Merriam pieno tuning	3	
April	13	Blake, Com. for renting farm	10	
Feby	23	Bottel, Drayage pianos	7	50
	24	" " "	1	25
	27	Salary, Wyman	100	
Mch.	1	½ rent old quarters Union	145	83
	"	Horse & buggy W. Mudge	2	
	4	costs v Alnscow Gosney	1	90
	5	" " Int. Land & Inv. Co.	27	55
	8	" " Mathews	5	
	17	" Apollo Club		
		" " Bradley		
		" " Morrisey	16	35
	20	Salary, Wyman	50	
		" "	50	
Apl	1	½ rent old quarters	145	83
	13	Prem. on 2 bonds in case Int. Land & Inv. Co.	10	
	10	Costs v " " " "	2	15
	"	Om. Mer. Adv. Riall H. H. goods	12	25
	16	Plumb, for pianos scarf	3	
	19	Costs v Int. Land & Inv. Co.	2	
	20	Tuning & cleaning piano	2	50
	"	West moving	3	75
	24	Franklin Sav. B. v Nichol	5	65
		Sup. court fees		
	27	Potter Cd Abstract judgt. C. E. Squires	5	50
	"	Costs Fitch Bay & Co. note	3	

	28	Recording Assignment, Mtge. Squires	1
	"	Rec. Q. C. deed Kimball to Bk.	1 25
May	4	½ rent old quarters	145 83
	11	Stamps envelopes	2 18
		Ford,	7672 52

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1897	.	Brt. ford.	7672 52
May	11	Rec. Trimble Mtge.	20
	27	Pub. notice annual meeting	1
	"	Execution E. B. & P. Chapman	1 25
	"	Rec. agreement F & C M. Co.	1 40
June	1	Costs in J. I. Lewis case	3
	—	½ rent. old quarters	145 83
	10	Costs in J. B. Meikle suit	3
	19	Stamped envelopes & Stamps	5
	25	Transcript Om. Coffin Mfg. Co	4
	28	Execution, Chapman	1 20
	"	" Bogart .	2 50
	29	M. T. Murphy witness fees	2
July	1	Execution Smiley & Crowe	1 25
	3	½ Rent old quarters	145 83
	19	Costs v Int. Land & Inv. Co.	18 95
Augt.	6	Jas. Burness, salary	200
	7	½ rent old quarters	145 83
	26	F & C. M. Co. electric light	53
	30	Stamped envelopes and stamps	4
	"	Execution, Bogart	1 20
Sept	14	½ rent old quarters	145 83
	7	Steno. services Festner case (F. E. Bell)	50
	18	Collecting coupons Holdrege bonds	2 11
	21	Johnson Bros. Moving pianos	2
	30	Adv. F & C. M. Co's pianos	10
	"	Jas. Burness, salary	100
	"	" " expenses to Perry. Ia.	2 86
Oct.	7	½ rent old quarters	145 83
	8	Execution Smiley & Crowe	1 20
	9	Transcript Om Coffin Co.	5
	"	Sundry costs	96
	16	Stamps, envelopes, 200	4 36
	29	Powers costs Kennedy	3 20
	"	" Trans. & Ex "	2 95
	"	" " " Burdick	1 25
Nov	1	Salary, Burness	50
	2	Execution, B & J. Riley	1 25
	"	" Colvin et al	1 25
	4	½ rent old quarters	145 83
	12	costs York case	16 45
	16	Powers. Trans. Morrisey	1 25
	19	Collecting coupons, Holdrege bonds,	4 58
Dec.	1	Salary, Burness	50
	"	½ rent old quarters	145 83
	6	Execution Colvin et al & Riley	2 20
	"	" Gridley, et al	1 25
	27	½ rent old quarters	145 83
	"	Troll. Sbf. Pruyn case	21
1898			
Jany	3	Burness, salary	50
	7	Execution, Gridley & Morrison	1 20
	17	Stamped envelopes & Stamps	5
		Ford.	9576

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1898		Brt ford,	9576	
Feby.	1	Burness, salary	50	
	"	Porter, for moving pictures		50
	10	Rec. deed Baird to K. Toft prop.	1	15
	"	" " " Brown to Bank, Smith's Add.	1	15
	11	W. H. Thompson, fees Om. Coffin case	3	
	24	World-Herald Adv. annual mtg.	2	16
		McDonald Shf. Om. Coffin case	1	50
Mch.	1	Burness salary	50	
	"	Rubber bands & car fare		55
	4	Long (J. P.) Richards suit	2	75
	7	Rec. deed Parrotte (George) to Bk	1	15
	8	Long. Trans. judgt. Richards	1	25
	11	" " " Guill	3	65
	"	Clk. D. C. Exec. M. & W. C. Cain	1	25
Apl	1	Burness, salary	50	
	7	Stamped envelopes	4	10
	4	McDonald Shf. Exec. M & W. C. Cain	1	20
	15	Collecting coupons Holderge bonds	3	93
	18	G & Moody certificate surety bond	1	
	30	Burness, salary	50	
May	16	Lighton. Deposition Youlen case	8	80
	17	Broadwell & wife, witness " "	4	
June	2	Burness, salary	50	
	4	Snowden. Exec. Krag & Thielgaard	1	10
	30	Burness, salary	50	
July	15	Blackburn, costs Graham suit	3	15
Augt.	1	Burness, salary	50	
	"	Stamped envelopes & stamps	5	
	5	Prichard (J. P.) costs Graham case	3	75
	2	Revenue stamps	1	
	12	Clk. D. Crt. Exec. Hamilton	1	25
	31	Burness, salary	50	
July	26	McGowan, Brk. sidewalk Kountze Place	122	72
Augt	31	" " E. V. Smith Add.	60	80
Oct.	6	Revenue Stamps	1	
	1	Burness, salary	50	
Nov.	"	" " Oct. salary	50	
	2	Jones Court Clk. costs Youlen case	30	85
	4	Clk. D. Crt. execution Walsh	1	25
	15	Garbage contr. cleaning vault Prospect Place	5	20
	30	Burness, salary	50	
Dec.	6	Cunningham witness fees Stoddard case	2	
	"	Murphy " " " "	2	
	"	Reg. deeds " " " "	2	
	2	Clk. Crt. Exec. Fleishman et al	1	25
	5	Stamps & envelopes stamped	4	18
	9	McDonald & Shf. Exec. Fleishman et al	2	20
	10	Clk. crt. Exec. Briggs Place Bldg. Assn.	1	25
	13	Thomas, Constable fees, Cooley, case		75
	31	Burness. salary	50	
		Ford	10471	79

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1899		Brot Ford	10471	79
Jany	9	Revenue stamps	1	
	20	Adv. notice annual mtg.	2	
	3	Revenue stamps & stamped envelopes	5	36
	"	Memorandum pads		50
	23	Printing Brf. for Sup. Crt. Doolittle et al	11	50
	19	McDonald Shf. Exec. Briggs Place Bldg. Assn.	1	10
	"	" " Subpoena Stodard case	1	40

Feby.	1	Burness, salary & car fare	50 10
	"	Rec. deed 2" Lot 16 Sec. 21-15-13	1 25
	"	W. A. Foster, Spl. Master Sale Lot 2 Blk. 6 Paddock Place	20
	7	Clk. Crt. costs Williams-Nattinger case	21 63
Apri	13	Russell & Co. abstract to Dallas Co. farm	7 50
		costs Youlen & Cole	11 05
Feby	13	Clk. Crt. Exec. Wasserman	1 25
Mch.	"	McDonald Shf. "	1 20
	1	Burness, salary & car fare	50 10
	"	Recording Mtge. Wooley to Bk.	1
	11	Revenue stamps	1
Apl	1	Burness, salary	50
	3	Postage stamps	50
	11	Revenue stamps	1
	"	Stamped envelopes & Rev. stamps	5 50
	17	W. T. Wattles, examining Boone Co. lands	12 30
May	1	Burness, salary	50
	3	Clk. Dist. Crt. Exec. Taylor & Boyd	1 25
	8	Wyman, Releasing Jdgt. Nelson & Mtg. Howell Place	75
	18	Vlk. Dist. Crt. Exec. McEathron	1 25
June	1	Burness, salary	50
	16	Clk. Dist. Crt. Exec. D. H. Seaver	1 25
	17	" " " Petition P. Mergen	2 50
	26	McDonald Shf. Ex. Taylor & Boyd	1 20
		" " " McEathron	1 20
		" " Notice Steinberg et al	85
		" " Order " "	85
		" " " " "	4 15
		" " Exec. D. H. Seaver	1 10
		" " Summons P. Mergen	85
	30	Burness, salary & car fare	50 45
July	11	Messick Steno. services Steinberg case	8
	20	Revenue stamps	1 50
Augt	1	Burness, salary	50
	"	Rec. Assignments to Lot 4 B 316	2 20
		Curtis Lot, from McC Invt. Co.	
	11	Revenue stamps	1
	14	Stamped envelopes	4 36
Sept	1	Burness, salary	50
	2	Blackburn, costs Walworth case	10
	9	Clk. Dist. Crt. Exec. Paul Platz	2 50
	26	" " costs Steinberg case	11 13
	"	McDonald Shf. Exec. Paul Platz	2 20
	"	" Summons &c. Steinberg case	5 60
		Ford.	11046 17

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Dr. Expense.

1899		Brot. ford	11046 17
May	9	Clerks costs Re. Lot 2 Blk 6 Paddock Place	14 65
	10	Rec. Spl. Master's deed for above	1 50
Sept	30	Burness, salary	50
Oct	5	" expense to Dawson, Ia	1 95
	"	Revenue stamps & Postage	2
	19	Exchange Randolph's draft	12
Dec	13	" " "	50
Nov.	9	Revenue stamps for deed	2 50
	"	Releasing Pierson Judt.	60
1900		Burness, salary to 1-7-00	241 93
Jany	23	Clk. Dist. Crt. Exec. J. W. & G. Paul	1 25

Feby.	2	McCague Invt. Prem. Ins. Prospect Place house	8
	"	World Herald Av. meeting	1 50
	6	Clk. Dist. Crt. Exec. Stringer	1 25
	9	Jno. Powers, Shf. " " & Paul	2 20
	13	Blackburn, costs Bartlett suit	2 50
		" " J. N. Grill	2 50
		" " L. J. Cooley, et al	2 50
		" " Office Hardy	1 20
		" Sheriff	1 45
	15	Stamped envelopes & stamps	4 50
	21	Burness, salary	50
Mch	14	Clk. U. S. Crt. copy order	1
	15	Burness, salary & car fare	50 75
April	5	Broadwell Clk. costs Baldwin	9 33
		" Costs & Releasing, Eldridge judgment	2 15
Mch	10	" " " "	1 25
Apl	3	Burness, salary	50
	9	Revenue stamps deed to Dallas Co. Ia. farm	16 50
		Mailender Place, Furnas Co. land & Millard & Caldwell's Add.	
	10	Telegram to J. W. Russell	1 19
	11	Reg. Deeds Mailender place deed	1 15
		Clk. Dist. Crt, Exec. Nichol & Wilkinson	2 50
Atty. fees			
	30	W. H. Thompson, services Steinberg case	~~100~~
		" costs " "	4 65
May	3	Burness, salary	75
	2	Powers, Shf. Exec. Nichol & Wilkinson	2 20
	7	Clk. U. S. Crt. copy order	1 00
	"	" " " "	1 55
June	5	Burness, salary	75
Mch	12	Exchange Springfield Gravel Co. chk	10
June	18	Burness, salary	50
	21	Broadwell, clk. Execn. Williams & Winter	2 50
	29	" " Costs Steinberg case	40 48
	1	Abstract Millard & Caldwell's Addn.	31 50
	"	" Marion Place	6 50
		" Lot 8 B. 121 So. Omaha	17
July	25	Burness, salary	75
	"	Revenue stamps & car fare	1
	16	Broadwell, Clk. Exec. M. T. Murphy	1 25
Augt.	3	E. J. Hicks, Rec. deed to Betts Monmouth Park lot	1 35
		Ford,	11962 67

474 In Account with the American National Bank. Cr.

1900			
		Brot. ford.	11962 67
Augt	7	Burness, salary	75
	11	Fawcett Bill of Excep. Bkrs. Bldg. & L. Assn.	12 25
	31	Burness, salary	50
Sept	17	Thompson, Printing Brf. Coffin Mfg. Co.	9 50
Oct	4	Burness, salary	70
	15	Powers, Shf. Exec. Murphy & Williams	2 20
	22	Clk. Dist. Crt. " Doolittle & Baldwin	1 25
	"	Recording deeds to Bowling Green lots	1
	31	Burness. salary	75
Nov.	6	Revenue stamps & Cert. U. S. Clk. Galena Axle Grease stock	1 45
	24	Chas. Battelle, Trans. & Adv. costs Bkrs. Bldg. & Loan Assn.	17

Dec.	3	Burness, salary	75	
	7	Clk. Dist. Crt. costs Cooley & S case	2	50
	8	" U. S. Clr. Crt. costs	10	
	6	Weaver & Giller, Steinberg case	500	
	17	Powers Shf. Exec. Doolittle & Baldwin	1	20
	"	" " " Cooley & S	1	55
	31	Burness, salary	75	
1901				
Jany	5	Postage & Revenue stamps	1	45
		Calender .10 Car fare .30, Dumont claim .50		90
	18	Repairs Kountze Place (filing same) (old bill)	1	02
Feby	1	Burness, salary	75	
	21	Broadwell, Clk. Adv. costs McMahon	2	50
	23	" " " Theo. Olsen	2	50
	28	Burness, salary	75	
Mch	6	Co. Court, Exec. Stevens & Son	1	25
	7	Broadwell, Clk. J. Fawcett	2	50
	21	Powers, Shf. Summons "		85
		" " McMahon		95
		" " Olsen	1	05
Feby	27	Broadwell, Clk. costs, Curtis	4	08
	"	" " " " et al	4	18
Mch	30	Burness, salary	75	
Apl	10	Revenue & postage stamps	1	
	16	Releasing, McConnell Judgt.	1	10
"	25	Powers Shf. Exec. Stevens		75
	30	Burness, salary	75	
Mch	"	Broadwell, Clk. Exec. Am. Asphalt Co. & Burdick	2	50
May	20	Powers, Shf. " " " "	2	20
	29	Burness, salary	112	50
June	17	Broadwell, Clk. Exec. H. A. Worley	1	25
	"	Reg. Deeds, Rec. deed Ackerman Place	1	15
	29	Burness, salary	75	
Mch	30	Rep. roof house, Prospect Place	5	07
	10	Connor, Com. sale Lots in So. Omaha	50	
	10	Extending abstract, Lot So. Omaha	3	
July	2	Powers, Shf. Exec. H. A. Worley	1	10
	31	Burness. Salary	75	
Augt.	"	" "	75	
Sept	30	" "	75	
Oct	31	" "	75	
		Ford,	13822	42

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1901		Brot. ford,	13822	42
Augt	31	Com. sale Lot 12 B. 32 Ambler Place	25	
	"	Abstract for above	18	50
	2	1-5th costs Dufrene v. Loveland case for division of land (Squires) near Deaf & Dumb Institute	28	35
1897				
Jany	19	Prem. Ins. Prospect Place, prop.	9	60
Feby	16	Toft Place plumbing reprs.	10	
Apri	3	Kountze Place " " Hannighen,	144	
1898				
Feby	17	J. E. Markel, ½ Brower's note, Waterloo property	32	
	"	" " " " .½ rent Waterloo property	44	55
1900				
June	27	" " " " less taxes	99	41
Augt	25	" " sale old mill	100	
1901				
Feby	1	" " 1st payment less taxes	30	24
June	9	" " Rent	94	62
			$14458	69

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The Following Notes Held in the "Loans & Discount" Account, have been settled by compromised and otherwise adjusted or wiped out by the parties taking advantage of the bankrupt law.Some payments have also been made on account.

T. W. Blackburn	275		Settled by services rendered		
C. M. Brewster	23		Bankruptcy		
S. S. Beebe	64		"		
N. E. & S. D. Barkalow	100		Paid, should now read	$550	550
Luther S. Cushing	2697	03	" " " "	$2750	2750
Chas. E. Clapp & W. W. Williams	775		Compromised		
S. S. & C. E. Curtis	1200		"		
S. S. Curtis	2500		Transferred to judgment act.		
"	90		" " "		
" & F. J. Sackett	2639	48	" " "		
" "	274	50	" " "		
H. A. Doud	2		Paid should now read $248		248
J. H. Dumont	23	75	" " " "		1976 25
Dawson Brick Co.	3700		Reed. act. sale plant $182.97		
Jno. F. & C. J. Flack } Jno. F. Flack Co. }	1200		Bal. charged to P. & L. Paid $300 more to be paid when balance will be charged To Profit & Loss		
Ford & Charlton Music Co.	1249	74	Paid $165. bal. to P. & L.		
H. R. Gould	135		Paid, should now read		170
J. Q. Gaston	55	05	Deceased, charged to P. & L.		
G. J. Hunt	1		Paid should now read		2249
C. F. & H. F. Haman	215		" " " "		1035
C. F. Harrison & C. A. Goss	478	20	Compromised for 100. &		
J. J. Hannighen	203	84	Paid (deed to lot in Ackerman Place.		
J. P. Mallender	515		Bankruptcy		
H. W. & E. M. Mathews	100		Paid, should now read		1900
N. B. Ours	17	50	Bankruptcy		
W. S. Seavey	70		"		
C. H. Walworth	3500		Compromised for $300		
Hy. F. Wyman	240		Paid in full		
Geo. S. & E. Wallace	8		Paid $1. on each note		
D. C. Patterson	1		" should now read		1147 25
Kirstine Jessen	10		Paid		
	$22363	09			
As shown per statement of Oct. 8th 1899	205847	22			
Add Nason Bros. notes, less $100 paid	1650				
	207497	32			
Deduct above	22363	09			
Total Oct. 31st 1901	$185134	23			

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STOCKS, SECURITIES, CLAIMS &c.

The following alterations should be made in above accounting, viz:

STOCKS

50 shares Galena Axle Grease Co's stock sold for $2247.75 Balance charged to Profit & Loss

BONDS.

5 McCague Invt. Co. 2nd Series "D" Debenture bonds sold for $500. Balance charged to Profit & Loss.

JUDGMENTS.

Apollo Club	99 25	Sold to G. A. Magney for $70 Bal to P & Loss
E. H. Duncan	41 27	Bankruptcy, charged to P & Loss
F. R. McConnell	380 43	Compromised for $200 unclaimed bal. of 83.33. Bal. charged to P. & L
N. B. Ours	1233 39	Bankruptcy, charged to P & Loss
E. B. & Pauline Chapman	596 42	" " "
Broken Bow Roller Milling Co. S. J. Lonergan	1051 92	Sold for $10, Lorengan, Bankpt. Bal. charged to P & Loss
Briggs Place Bldg. Assn. et al	1917 49	Sold for $1000. Bal charged to P. & L.
E F. Fleishman, Steinberg et al	517 09	Assigned & settled
W. H. Eldridge	211 34	Compromised for $100, Bal. P. & L.
R. I. Mattice	2067 52	Bankruptcy, chgd. to P & Loss
W. N. Williams & Hy. M. Morrow	459 52	Compromised for $100. Bal to P & Loss.
" "	568 44	
Doolittle & Baldwin Cr. with act. Quit claim to Lot	25	No equity in Lot to Bank
There has been added to this account, S. S. Curtis, Jdgt.	3673 75	
F. J. Sackett	4306 15	
The total of this account, viz: Stocks, Securities & C. is now at this date, Oct. 31, 1901	$42338 40	

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REAL ESTATE

The following alterations and additions should be made in this account as per statement of October 8th, 1899 already in evidence.

Ambler Place, Lot 12 Block 32.	Contract of sale made $500
So. Omaha, Lot 7 " 121	" " " $500
" " 8 " "	Sold for $800.
Kountze Place Lots 1 & 2 Block 17.	Mortgagee has taken this on nominal payment to Bank.
Douglas Co. undivided ½ interest in Waterloo property, 23 acres and E. ½ N. E. ¼ Sec. 10-15-10 and S. W. ¼ N. W. ¼ Sec. 11-15-10	Sold for $3500. (½ to Bank)
Dallas Co. Iowa, S ½ N. W. ¼ & N. ½ S. W. ¼ Sec. 13 and N. E. ¼ Sec. 16-81-29	Sold for $12,800, less mortgage $5000 & Int. $300.

Dallas Co. Iowa, S. E. N. W. & part N. E. S. W. Sec. 10-81-29 with brick plant	Sold for $3000. Bank's proportion $182.97
ADDITIONS TO,	
2 inches tax lot 16, Sec. 21-15-13	
Undivided 1-8 W ½ N. E. ¼ N. E. ¼ 6-15-13 Douglas Co. divided	Bank holds 2½ acres.
Bowling Green, Lots 4, 5, 6, & 7 Block 8	From Flack, Jno. F.
Ackerman Place Lots 2 Block 7	" C. F. Harrison
Douglas Co. Undivided 1-5 in S. ½ S. W. N. W. ¼ Sec. 8-15-13	Since divided, Bank holds Lot 2.

Millard & Caldwell's Addn. East 30' ex No. 10' of Lot 28 Sold to G. W. Luce for $1250 certified check deposited in First Natl. Bank, Deed not passed.

479 COPY OF EXHIBIT "34".

Certificate for Certified Copy.

Treasury Department,
Office of the
Comptroller of the Currency—ss.

Under the provisions of Section 884 of the Revised Statutes of the United States, I, Wm. B. Ridgely, Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original certificate of Henry F. Wyman, Cashier, The American National Bank of Omaha, Nebraska, relative to voluntary liquidation of said Bank, and of the whole of such original on file and of record in my office.

In Testimony Whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the City of Washington and District of Columbia, this twenty-eighth day of October A. D. 1901.

[Seal] WM. B. RIDGELY,
Comptroller of the Currency.

Certificate for Voluntary Liquidation.
No. 4087.

American National Bank,
Omaha, Nebr., Feby. 27th, 1896.

To the Comptroller of the Currency,
Washington, D. C.

Sir:

It is hereby certified, in pursuance of Sections 5220 and 5221 of the Revised Statutes of the United States, that at a
480 meeting of the Stockholders of the American National Bank, located at Omaha, in the State of Nebraska, duly notified and held pursuant to law and the Articles of Associa-

tion of said Bank at the office of said Association at Omaha, Nebraska, aforesaid, on the 25th day of February, 1896, it was voted by the Stockholders of said Association, owning two-thirds of its stock, that said Association go into liquidation and be closed.

In Testimony Whereof, I have, by instruction of the Board of Directors of said Association, hereto subscribed my name and affixed the seal of said Association at Omaha, Nebraska, aforesaid, the day and year above written.

[Place for Seal] HENRY F. WYMAN, Cashier.

481 United States of America,
State and District of Nebraska,
County of Douglas—ss.

I, G. S. Waring, Notary Public, in and for the State and County aforesaid, do hereby certify that William Baird, Henry F. Wyman, H. E. Rainey, James Burness and G. W. Wattles were by me first severally duly sworn to testify the truth, the whole truth and nothing but the truth, and that the depositions by them respectively subscribed as above set forth, were reduced to writing by myself, and were respectively subscribed by the said [witnessed] in my presence, and were taken at the time and place in the annexed notice specified; that I am not counsel, [sttorney] or relative of either party, or otherwise interested in the event of this suit; and said depositions were commenced at the time in said notice specified and continued by adjournments from day to day or to dates agreed upon by the parties, as appears in said depositions.

In Testimony Whereof, I have hereunto subscribed my name and affixed my Notarial Seal, this 30th day of November, 1901, at Omaha, Nebraska.

[Seal] G. S. WARING,
Notary Public.

Indorsed: Filed Dec. 30, 1901. Geo. H. Thummel, Clerk.

Notary's Fees	
538 folios of testimony at 20c.	107 60
Swearing 5 witnesses	50
Certificate	25
	108 35

The above fees pd by complainant.

482 Thereupon afterwards, to-wit: On the 23rd day of May 1903 Petition for Appeal and Assignment of Errors

was filed in said case, which said Petition, etc., is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

Sumner Wallace,
Doc T. vs. No. 261.
American National Bank, et al.

Petition for Appeal and Assignment of Errors.

To the Court:

Edgar M. Morsman one of the defendants in the above entitled cause, shows that the final decree herein adjudges him to pay to the complaniant the sum of $1744.50 and to pay the Union National Bank the sum of $5,547.75; that said final decree is prejudicial and erroneous as follows, to-wit:

Assignment of Errors.

(1) The Circuit Court erred in rendering the decree against this defendant because said Court had not jurisdiction of said cause, that is to say: the complainant, sues as the assignee of a chose in action, to-wit: a non-negotiable promissory note executed by the American National Bank of Omaha as maker and in favor of Union National Bank of Omaha as payee each of whom was at the time of the execution and delivery of said note and at the time of the filing of the original and amended Bills a citizen and resident of the State of Nebraska.

(2) The Circuit Court erred in rendering the decree against this defendant because said court had not jurisdiction of said cause, that is to say: The said American National Bank
483 had not gone into voluntary liquidation pursuant to section 5220 of the Revised Statutes of the United States at any time prior to the rendition of said decree.

(3) The Circuit Court erred in rendering said decree against this defendant because said court had not jurisdiction of the cause, that is to say; the complainant had not reduced his claim to judgment against the American National Bank and exhausted his remedy at law.

(4) The Circuit Court erred in rendering said decree against this defendant and in adjudging this defendant to pay to the complainant Sumner Wallace, the sum of $1744.50 because the agreement between the American National Bank and the Union National Bank, dated Dec. 21, 1895, a copy of which is attached to the Amended Bill of Complaint, as Exhibit "A"

and the alleged promissory note, set out in the said Bill are ultra vires and void and create no liability for which shareholders are responsible.

(5) The Circuit Court erred in rendering the said decree against this defendant and in adjudging this defendant to pay the said complainant the sum of $1744.50 because the obligation of the American National Bank sued on is not an obligation incurred, contracted or assumed in the course of the business of banking.

(6) The Circuit Court erred in rendering said decree against this defendant and in adjudging this defendant to pay the sum of $5,547.75 to the Union National Bank, because the Agreement between the American National Bank and the Union National Bank dated Dec. 21, 1895, a copy of which is attached to the Amended Bill of Complaint and the alleged promissory notes set out in the answer or claim of the Union National Bank are ultra vires and void and create no lia-
484 bility for which shareholders are responsible.

(7) The Circuit Court erred in rendering said decree and in adjudging this defendant to pay to the Union National Bank the sum of $5,545.75 because the claim of the said Union National Bank is founded upon an alleged obligation of the American National Bank which was not incurred, assumed or contracted in the business of Banking.

(8) The Circuit Court erred in rendering the said decree and in adjudging this defendant to pay to the Union National Bank the sum of $5,547.75 because said court had not jurisdiction of this defendant as to said claim.

(9) The Circuit Court erred in not rendering a decree for this defendant.

Wherefore this defendant prays that an appeal be allowed with supersedeas and for a Citation.

EDGAR M. MORSMAN,
By W. W. Morsman, Solicitor.

Indorsed: Filed May 23 1903. Geo. H. Thummel, Clerk.

485 Thereupon afterwards, to-wit: On the 23rd day of May, 1903, Supersedeas Bonds were filed in said case, which said Bonds are in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

Sumner Wallace, Complainant,
Doc. T. vs. No. 261.
American National Bank of Omaha, et al., Defendants.

Supersedeas Bond.

Know all Men by These Presents: That we, Edgar M. Morsman, of the County of Douglas and State of Nebraska, as principal and Casper E. Yost of the same County and State, as surety, are jointly and severally held and firmly bound unto Sumner Wallace his heirs and assigns, in the penal sum of Three Thousand Dollars ($3,000) lawful money of the United States well and truly to be paid.

The Condition of the foregoing obligation is such that:
Whereas the above bounden Edgar M. Morsman has appealed from the decree and judgment of the Circuit Court of the United States for the District of Nebraska, in a certain cause therein pending wherein the said Sumner Wallace is complainant and the said Edgar M. Morsman is a defendant, and wherein judgment was rendered against the said Edgar M. Morsman for the sum of $1744.50 Dollars in favor of the said Sumner Wallace,

Now Therefore, if the said Edgar M. Morsman, appellant in said cause shall prosecute his said appeal to effect, and answer and pay all damages and costs, if he fail to make good his plea, then this obligation to be null and void, but otherwise in full force and virtue.

486 Witness our hands the 13th day of May A. D., 1903.

EDGAR M. MORSMAN,
CASPER E. YOST.

Bond & Surety Approved.
W. H. MUNGER, Judge.

Indorsed: Filed May 23, 1903. Geo. H. Thummel, Clerk.

487 In the Circuit Court of the United States for the District of Nebraska.

Sumner Wallace, Complainant,
Doc. T. vs. No. 261.
Union National Bank of Omaha, et al., Defendants.

Supersedeas Bond.

Know all Men by These Presents: That we, Edgar M. Morsman, of the County of Douglas and State of Nebraska, as prin-

cipal and Casper E. Yost of the same County and State, as surety, are jointly and severally held and firmly bound unto Union National Bank, its successors and assigns in the penal sum of Seven Thousand Five Hundred dollars ($7,500) lawful money of the United States well and truly to be paid.

The Condition of the foregoing obligation is such that:

Whereas the above bounden Edgar M. Morsman has appealed from the decree and judgment of the Circuit Court of the United States for the District of Nebraska, in a certain cause therein pending wherein the said Sumner Wallace is complainant and the said Edgar M. Morsman is a defendant, and wherein judgment was rendered against the said Edgar M. Morsman for the sum of ($5547.75) Dollars in favor of the said Union National Bank of Omaha, Nebraska.

Now Therefore, if the said Edgar M. Morsman, appellant in said cause shall prosecute his said appeal to effect, and answer and pay all damages and costs, if he fail to make good his plea, then this obligation to be null and void, but otherwise in full force and virtue.

488 Witness our hands the 13th day of May A. D., 1903.

EDGAR M. MORSMAN.
CASPER E. YOST.

Bond & Surety Approved.
W. H. MUNGER, Judge.

Indorsed: Filed May 23, 1903. Geo. H. Thummel, Clerk.

489 Thereupon afterwards, to-wit: On the 1st day of July 1903, "Precipe for Transcript on Appeal of Edgar M. Morsman" was filed in said case, which said Precipe is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

Sumner Wallace,
No. 261. vs. Doc. T.
American National Bank, et al.

Precipe for Transcript on Appeal of Edgar M. Morsman.

To the Clerk of Said Court:

Please make a transcript of the following parts of the record in the above entitled cause for appeal to the United States Circuit Court of Appeals, to-wit:

1. The original Bill, filed August 18, 1898.

2. The Memorandum Opinion of Judge Munger, filed Sep. 29, 1899

3. The Motion to appoint James Burness, Trustee, filed Dec. 5, 1899

4. The Order appointing James Burness, Trustee, entered Jan. 8, 1900.

5. The order granting leave to complainant to file Amended Bill of Complaint, entered February 7, 1900.

6. The Amended Bill of Complaint, endorsed "Filed Feby. 17, 1900," also endorsed "Re-filed Jany. 8 1901".

7. Order granting leave to re-file Amended Bill of Complaint entered Jany 8 1901.

8. The Separate Answer of Edgar M. Morsman to the Amended Bill of Complaint filed Jany 24, 1901.

9. The Answer of Union National Bank to the Amended Bill of Complaint filed August 2, 1901.

10. The general Replication to the answers of all defendants, file August 2nd, 1901.

11. All of the evidence and depositions.

12. Record entry July 1st, 1902, showing the case heard on proofs and submitted.

490 13. The Memorandum Opinion of Judge Munger, filed Sep. 1, 1902.

14. The Order confirming sale of assets entered Dec. 9 1902.

15. The Order Confirming Final Report of Burness as Trustee, entered Jan 3 1903.

16. Memorandum Opinion of Judge Munger, filed April 24, 1903.

17. The Final Decree entered May 23rd 1903.

18. The Petition for Appeal and Assignment of Errors of Edgar M. Morsman, filed May 23, 1903.

19. The Supersedeas Bond of Edgar M. Morsman in favor of Sumner Wallace filed May 23rd 1903.

20. The Supersedeas Bond of Edgar M. Morsman in favor of Union National Bank, filed May 23 1903.

21. This Precipe and Notice.

W. W. MORSMAN,
Attorney for Edgar M. Morsman.

To Sumner Wallace and Union National Bank:

You will take notice that Edgar M. Morsman, a defendant, in the above entitled cause, deems the parts of the record specified in the foregoing Precipe all that is necessary for the hearing, on his appeal, in the United States Circuit Court of Appeals.

W. W. MORSMAN,
Solicitor for Edgar M. Morsman.

Received Copy of the foregoing Precipe and Notice this 3rd day of June, 1903. HALL & McCULLOCH,
Counsel for Sumner Wallace and Union National Bank.

Indorsed: Filed July 1, 1903. Geo. H. Thummel, Clerk.

491 Thereupon afterwards, to-wit On the 23rd day of May, 1903, Petition for Appeal and Assignment of Errors" was filed in said case, which said Petition and Assignment are in words and figures following, to-wit:

In the Circuit Court of the United States [ihn] and for the District of Nebraska.

Sumner Wallace, Complainant,
No. 261 vs. Doc. T.

American National Bank, a corporation, The McCague Investment Company, a corporation, Thomas H. McCague, Alex. G. Charlton, Elmer C. Brownlee, Elizabeth Dufrene, Executrix of the last will and testament of Alfred H. Dufrene, deceased, Edgar M. Morsman, Philip Mergin, George G. Wallace, William S. Poppleton, John S. King, William Wallace, Charles F. Manderson, Anna C. Crowell, Charles C. George, Robert H. McClellan, Peter Frenzer, John N. Frenzer, Charles H. Walworth, Frank W. Wessells, Frank Graham, James H. McCulloch, John P. Charlton, C. W. Morton, Royal Wilson, Jacob Wead, James J. Brown, Jr., James J. Woodward, Viola Coffin, Howard B. Smith, Edward G. Glenn, Emily J. Robinson, James H. Morton, George Morton, Mary E. Morton, William Wilson, Henry F. Wyman, Albert U. Wyman, F. R. McConnell, Trustee, John Speer, John E. Patrick, R. L. Brownlee, Caroline Carpenter, William C. Beer, Marcus C. Acheson, George Marples, Arthur H. Flack, Meade C. Williams, James H. Conrad, T. R. Neal, J. H. Hawkins, William Baird, The Manufacturers' National Bank of Boston, Mass., a corporation, John L. McCague, Morris Levy, National Bank Building Company of America, a corporation, John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners doing business under the firm name and style of McCague Bros., Rufus B. Bullock, Thomas L. Kimball, Thomas L. Kimball, Trustee, Alex H. Charlton, Secretary, Samuel Blackwell and the Union National Bank of Omaha, Nebraska, Defendants.

Petition for Appeal.

Now come Elmer C. Brownlee, George G. Wallace, Charles C. George, Peter Frenzer, John N. Frenzer, Howard B. Smith,

Henry F. Wyman, Albert U. Wyman, Morris Levy, defendants in the above entitled action and now comes each of said defendants, and conceiving themselves and each conceiving himself aggrieved by the decree made and entered in the
492 above entitled cause on the 23 day of May 1903, do, and each of them does hereby appeal from said decree to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons specified in the assignment of errors filed herewith, and pray, and each of them prays, that this appeal may be allowed and that a transcript of the records, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Court of Appeals for the eighth Circuit.

Dated, May 23 1903.

ELMER C. BROWNLEE,
GEORGE G. WALLACE,
CHARLES C. GEORGE,
PETER FRENZER,
JOHN N. FRENZER,
HOWARD B. SMITH,
HENRY F. WYMAN,
ALBERT U. WYMAN, and
MORRIS LEVY.

By Howard B. Smith, their solicitor.

Indorsed: Filed May 23, 1903. Geo. H. Thummel, Clerk.

493 In the Circuit Court of the United States [ihn] and for the District of Nebraska.

Sumner Wallace, Complainant,
No. 261 vs. Doc. T.

American National Bank, a corporation, The McCague Investment Company, a corporation, Thomas H. McCague, Alex. G. Charlton, Elmer C. Brownlee, Elizabeth Dufrene, Executrix of the last will and testament of Alfred H. Dufrene, deceased, Edgar M. Morsman, Philip Mergin, George G. Wallace, William S. Poppleton, John S. King, William Wallace, Charles F. Manderson, Anna C. Crowell, Charles C. George, Robert H. McClellan, Peter Frenzer, John N. Frenzer, Charles H. Walworth, Frank W. Wessells, Frank Graham, James H. McCulloch, John P. Charlton, C. W. Morton, Royal Wilson, Jacob Wead, James J. Brown, Jr., James J. Woodward, Viola Coffin, Howard B. Smith, Edward G. Glenn, Emily J. Robinson, James H. Morton, George Morton, Mary E. Morton, William Wilson, Henry F. Wyman, Albert U. Wyman, F. R. McConnell, Trustee, John Speer, John E. Patrick, R.

L. Brownlee, Caroline Carpenter, William C. Beer, Marcus C. Acheson, George Marples, Arthur H. Flack, Meade C. Williams, James H. Conrad, T. R. Neal, J. H. Hawkins, William Baird, The Manufacturers' National Bank of Boston, Mass., a corporation, John L. McCague, Morris Levy, National Bank Building Company of America, a corporation, John L. McCague, Thomas H. McCague, William L. McCague, and Alex. G. Charlton, partners doing business under the firm name and style of McCague Bros., Rufus B. Bullock, Thomas L. Kimball, Thomas L. Kimball, Trustee, Alex. H. Charlton, Secretary, Samuel Blackwell and the Union National Bank of Omaha, Nebraska, Defendants.

Assignment of Errors.

And now on this 23 day of May 1903, Elmer C. Brownlee, George G. Wallace, Charles C. George, Peter Frenzer, John N. Frenzer, Howard B. Smith, Henry F. Wyman, Albert U. Wyman and Morris Levy, defendants in the above entitled action, come, and each of them comes, by their solicitor, and say; and each of them says, that the decree in said cause
494 is erroneous and against the just rights of these defendants and each of them for the following reasons, to-wit:

1. That said Circuit Court did not have jurisdiction over these defendants or either of them, because the complainant sued as the assignee of a chose in action, to-wit: (a non-negotiable promissory note) given by said American National Bank of Omaha, Nebraska, to said Union National Bank of Omaha, Nebraska, and each of these defendants, is a citizen and resident of Nebraska.

2. That said Circuit Court did not have jurisdiction of said cause, or of these defendants, or either of them, under the Act of Congress of June 30, 1876 (Supp. U. S. Rev. Stats. 107), because said American National Bank of Omaha had not gone into voluntary liquidation within the meaning of Sec. 5220 of the U. S. Revised Statutes or of any other of the banking laws of the United States; for the reason that said bank had no assets in its possession or under its control at the time certain of the shareholders of said bank voted to go into voluntary liquidation.

3. That said Circuit Court did not have jurisdiction of said cause or of these defendants, or either of them, under said Act of Congress of June 30, 1876, even if said American National Bank of Omaha had gone into voluntary liquidation, because said Amended Bill does not allege that complainant

or his assignor ever "presented his notes or other claims against the Association for payment" as provided in Section 5221 of the U. S. Revised Statutes.

4. That said Circuit Court did not have jurisdiction of said cause or of these defendants, or either of them, under the Act of Congress of June 30, 1876 (Supp. U. S. Rev. Stats. 107) because the complainant had not obtained judgment at law upon the note held by him and had not caused an execution to be issued thereon and returned nulla bona, and therefore, did not and could not file in said court a bill in equity in the nature of a creditor's Bill, as provided in said act.

495

5. Because the court finds and the decree adjudges that there is due from the American National Bank and the stockholders thereof to Sumner Wallace, complainant, upon the contract set out in the amended bill and the first of said notes, also set out in said amended bill, the sum of $46,524.83.

6. Because the court finds and the decree adjudges that there is due to said Union National Bank from said American National Bank and the stockholders thereof the sum of $147,941.52.

7. Because the court finds and the decree adjudges that each of these defendants is liable to the said Sumner Wallace and to the said Union National Bank in the sum set opposite his name, as follows:

From Elmer C. Brownlee, to the complainant, Sumner Wallace, the sum of	232 60	
From Elmer C. Brownlee to the said Union National Bank the sum of		739 70
From George G. Wallace to the complainant Sumner Wallace, the sum of	1744 50	
From George G. Wallace to the said Union National Bank, the sum of		5547 75
From Charles C. George to the complainant, Sumner Wallace, the sum of	348 90	
From Charles C. George, to the said Union National Bank, the sum of		1109 55
From Peter Frenzer to the complainant, Sumner Wallace, the sum of	348 90	
From Peter Frenzer to the said Union National Bank, the sum of		1109 55
From John N. Frenzer to the complainant, Sumner Wallace, the sum of	116 30	

	From John N. Frenzer to the said Union National Bank, the sum of			369 85
496	From Howard B. Smith to the complainant Sumner Wallace, the sum of	1163	00	
	From Howard B. Smith, to the said Union National Bank the sum of			3698 50
	From Henry F. Wyman to the complainant Sumner Wallace, the sum of	1354	89	
	From Henry F. Wyman to the said Union National Bank, the sum of			4308 75
	From Albert U. Wyman to the complainant Sumner Wallace, the sum of	2362	60	
	From Albert U. Wyman, to said Union National Bank, the sum of			739 70
	From Morris Levy to the complainant, Sumner Wallace, the sum of	1163	00	
	From Morris Levy to the said Union National Bank, the sum of			3698 50

8. Because the decree adjudges that the complainant, Sumner Wallace, have and recover of each of these defendants the sum set opposite his name, to-wit:

From Elmer C. Brownlee, the sum of	232 60
From George G. Wallace, the sum of	1744 50
From Charles C. George the sum of	348 90
From Peter Frenzer the sum of	348 90
From John N. Frenzer the sum of	116 30
From Howard B. Smith the sum of	1163 00
From Henry F. Wyman the sum of	1354 89
From Albert U. Wyman the sum of	232 60
From Morris Levy the sum of	1163 00

9. Because the decree adjudges that the Union National Bank have and recover of each of these defendants the sum set opposite his name, to-wit:

From Elmer C. Brownlee the sum of	739 70
From George G. Wallace the sum of	5547 75
From Charles C. George the sum of	1109 55
From Peter Frenzer the sum of	1109 55
From John N. Frenzer the sum of	369 85
From Howard B. Smith the sum of	3698 50
From Henry F. Wyman the sum of	4308 75
From Albert U. Wyman the sum of	739 70
From Morris Levy the sum of	3698 50

10. Because the decree adjudges that the said Sumner Wallace and said Union National Bank have judgment against

each of these defendants for the costs taxed at $..... against each of them.

11. Because the decree adjudges that execution be issued against each of these defendants.

12. Because the decree did not adjudge that each of these defendants was not liable to the complainant, Sumner Wallace, in any sum whatever.

13. Because the decree did not adjudge that each of these defendants was not liable to said Union National Bank of Omaha in any sum whatever.

14. Because the decree did not adjudge that each and all of these defendants, shareholders of the American National Bank of Omaha, was and were not liable in said action to said Union National Bank of Omaha, for the reason that said Union National Bank did not file a cross-bill in said action or otherwise plead therein except by an answer to the amended bill of complainant.

15. Because the decree did not adjudge that said American National Bank of Omaha was not indebted to said Union National Bank of Omaha before or at the time of the execution and delivery of the three notes in said amended bill described.

16. Because the decree did not adjudge that the execution and delivery of the contract or agreement set forth in the amended bill was ultra vires said American National Bank of Omaha.

17. Because the decree did not adjudge that the borrowing of money ($201,000.00) alleged in the amended bill from said Union National Bank by said American National Bank was ultra vires said American National Bank.

18. Because the decree did not adjudge that the execution and delivery of each of the three non-negotiable notes, due one, two and three years after date and drawing interest at 6% per annum from date, described in the amended bill, was ultra vires said American National Bank of Omaha.

19. Because the decree did not adjudge that the execution and delivery of the agreement and the giving of the notes mentioned in the amended bill were not within the powers incidental to the carrying on of the business of banking for which said American National Bank was established.

20. Because the decree did not adjudge that said American National Bank did not have power under Sec. 5136 of the

Revised Statutes of the United States to enter into said contract or to execute and deliver said notes.

21. Because the decree did not adjudge that said transaction to-wit, the execution of said agreement and the giving of said notes, was prohibited by the public policy of the United States as shown by the provisions of the Revised Statutes controlling the voluntary liquidation, involuntary liquidation and consolidation of national banks.

22. Because the decree did not adjudge that said transaction was prohibited by Sections 5145 and 5147 of the U. S. Revised Statutes.

23. Because the decree did not adjudge that said transaction was prohibited by Section 5202 of the U. S. Revised Statutes.

24. Because the decree did not adjudge that the transactions between said American National Bank of Omaha and said Union National Bank of Omaha set forth in the amended bill were not in the usual course of the banking business of said American National Bank, and that, for that reason, these defendants, shareholders of said American National Bank, were, and each of them was, not liable for any deficit
499 that might remain after the application of the assets of said bank to the payment of the three notes set forth in said Amended Bill.

25. Because the decree did not adjudge that the contract, debts, and engagements set forth in said amended bill were not duly contracted or entered into in the ordinary course of the business of said American National Bank of Omaha, and that, by reason thereof, the shareholders of said bank, to-wit; these defendants and each of them, were not liable to said complainant nor to said Union National Bank of Omaha, for the following among other reasons, to-wit:

(1) Because the transactions set forth in the amended Bill was not a borrowing of money by said American National Bank of said Union National Bank within the meaning of or within the powers conferred by the banking laws of the United States.

(2) Because the said American National Bank sold and assigned its business, its cash on hand, its office furniture and fixtures, and certain of its Bills Receivable to said Union National Bank.

(3) Because the agreement set forth in said amended bill provided that said Union National Bank should liquidate the assets of said American National Bank.

(4) Because in said agreement said American National Bank agreed to sustain and pay one-half the loss and expense which said Union National Bank might sustain on account of its removal from its present quarters by reason of its unpaid lease of its present place of business and one-half of the loss which it might sustain on the sale of its office furniture and fixtures.

(5) Because in said agreement said American National Bank guaranteed said Union National Bank against any and all loss on account of assuming its liabilities.

500

(6) Because in said agreement said American National Bank sold and assigned all of its remaining assets to said Union National Bank.

(7) Because the amount of the three notes mentioned in said amended bill was not determined and said notes were not signed until after said American National Bank had sold and assigned all its assets to said Union National Bank.

(8) Because said American National Bank was compelled to and did cease to do business as a bank.

(9) Because said American National Bank surrendered all control over its assets.

(10) Because its directors ceased to exercise any direction or control over its affairs or assets.

(11) Because said American National Bank entrusted to said Union National Bank all its assets to be sold, collected or compromised at the discretion of said Union National Bank.

(12) Because said American National Bank guaranteed that such assets should continue to be sufficient to meet the payment of the three notes set out in said amended bill.

(13) Because said American National Bank executed and delivered the three non-negotiable promissory notes mentioned in said amended Bill.

(14) Because said American National Bank agreed to pay interest at 6% per annum on $201,000.00 from and after Dec. 23, 1895.

(15) Because said American National Bank and the defendants, shareholders thereof, still remain liable for any valid indebtedness existing against said American National Bank at the time its assets were turned over to said Union National Bank.

501

Wherefore, these defendants pray and each of them prays that said decree be reversed and that said court may be directed to enter a decree dismissing said defendants and each of them with his costs.

Dated May 23 1903.

ELMER S. BROWNLEE,
GEORGE G. WALLACE,
CHARLES C. GEORGE,
PETER FRENZER,
JOHN N. FRENZER,
HOWARD B. SMITH,
HENRY F. WYMAN,
ALBERT U. WYMAN and
MORRIS LEVY.
By Howard B. Smith,
Their solicitor.

Indorsed: Filed May 23, 1903. Geo. H. Thummel, Clerk.

502 Thereupon afterwards to-wit: At the May 1903 Term of said Court, and on the 23rd day of May 1903, Order Allowing Appeal was signed and filed in said case, and entered of record on the Journal of Proceedings of said Court had on said day, to-wit:

Sumner Wallace, Complainant,
Doc. T. No. 261. vs In Equity.

American National Bank, a corporation, The McCague Investment Company, a corporation, Thomas H. McCague, Alex G. Charlton, Elmer C. Brownlee, Elizabeth Dufrene, Executrix of the last Will and testament of Alfred R. Dufrene, deceased, Edgar M. Morsman, Philip Mergin, George G. Wallace, William S. Poppleton, John S. King, William Wallace, Charles F. Manderson, Anna C. Crowell, Charles C. George, Robert H. McClellan, Peter Frenzer, John N. Frenzer, Charles H. Walworth, Frank W. Wessells, Frank Graham, James H. McCulloch, John P. Charlton, C. W. Morton, Royal Wilson, Jacob Wead, James J. Brown, Jr., James J. Woodward, Viola Coffin, Howard B. Smith, Edward G. Glenn, Emily J. Robinson, James H. Morton, George Morton, Mary E. Morton, William Wilson, Henry F. Wyman, Albert U. Wyman, F. R. McConnell, Trustee, John Speer, John E. Patrick, R. L. Brownlee, Caroline Carpenter, William C. Beer, Marcus C. Acheson, George Marples, Arthur H. Flack, Meade C. Williams, James H. Conrad, T. R. Neal, J. H. Hawkins, William Baird, The Manufacturers' Na-

tional Bank of Boston, Mass., a corporation, John L. McCague, Morris Levy, National Bank Building Company of America, a corporation, John L. McCague, Thomas H. McCague, William L. McCague, Thomas H. McCague, William L. McCague, and Alex. G. Charlton, partners doing business under the firm name and style of McCague Bros., Rufus B. Bullock, Thomas L. Kimball, Thomas L. Kimball, Trustee, Alex. G. Charlton, Secretary, Samuel Blackwell, and the Union National Bank of Omaha, Nebraska, Defendants.

Order Allowing Appeal.

On motion of the solicitor for each of the following named defendants in the above entitled action, to-wit: Elmer C. Brownlee, George G. Wallace, Charles C. George, Peter
503 Frenzer, John N. Frenzer, Howard B. Smith, Henry F. Wyman, Albert U. Wyman, Morris Levy, it is

Ordered in open court that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the final decree heretofore filed and entered herein be, and the same is allowed, and that a certified transcript of the record, testimony, papers and proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals. It is further

Ordered that the Bond on appeal for each of the defendants above named, who may desire to supersede said decree, shall be fixed at a sum which shall at least equal the amount adjudged against such defendant and interest thereon for a period of one and one-half years and costs taxed against him and that, upon the approval of such bond, said decree shall be superseded as to such defendant. It is further

Ordered that the bond on appeal for such of the defendants as to not desire to supersede said decree be fixed at the sum of $200.00 which shall be for costs only and shall, when approved, not operate as a supersedeas bond. It is further

Ordered that any or all of the defendants whose bond shall be approved, may join in such appeal without prejudice to any special or peculiar rights or defenses they or any of them may have and that one record only be transmitted to said United States Circuit Court of Appeals, which record shall be equally available to each and all of such defendants.

W. H. MUNGER, Judge.

Dated May 23 1903.

Indorsed: Filed May 23, 1903. Geo. H. Thummel, Clerk.

504 Thereupon afterwards, to-wit: On the 12th day of June, 1903, Bonds for Appeal were filed in favor of plaintiff and Union National Bank on behalf of the defendants Levy, J. N. & Peter Frenzer, George, and Wallace, and in favor of Union National on behalf of defendants Smith, Brownlee, A. U. & H. F. Wyman, which said Bonds are in words and figures following, to-wit:

In the Circuit Court of the United States in and for the District of Nebraska.

Sumner Wallace, Complainant,
No. 261 vs. Doc T.
American National Bank, et al., Defendants.

Bond for Appeal.

Know All Men By These Presents,

That we, Morris Levy principal, and Herman Cohn, surety are held and firmly bound unto the Union National Bank of Omaha, Nebraska, in the full and just sum of $4500.00 to be paid to the said Union National Bank of Omaha, Nebraska, its successors and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with [out] seals and dated this 9th day of June in the year of our Lord, one thousand nine hundred and three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska, in a suit pending in said court, wherein Sumner Wallace was plaintiff and the said Union National Bank of Omaha was one of the defendants, and said Morris Levy was one of the defendants, a decree was rendered against the said Morris Levy and
505 the said Morris Levy has obtained an order of the said court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

Now, the Condition of the above obligation is such, that if the said Morris Levy shall prosecute said appeal to effect and answer and pay all damages and costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

MORRIS LEVY
Sealed and delivered in presence of HERMAN COHN.
John C. Wharton.

Approved this 12th day of June 1903.
By W. H. MUNGER, Judge.

Indorsed: Filed Jun 12 1903. Geo. H. Thummel, Clerk.

In the Circuit Court of the United States in and for the
506 District of Nebraska.

Sumner Wallace, Complainant.
Doc. T. vs. No. 261.
American National Bank, et al., Defendants.

Bond on Appeal.

Know all Men by These Presents, That we Morris Levy principal, and Herman Cohn, surety, are held and firmly bound unto Sumner Wallace in the full and just sum of $1500.00 to be paid to the said Sumner Wallace, his heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with [out] seals and dated this 9th day of June in the year of our Lord, One Thousand Nine Hundred and Three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska in a suit pending in said Court, wherein Sumner Wallace was plaintiff and said Morris Levy was one of the defendants, a decree was rendered against the said Morris Levy and the said Morris Levy has obtained an order of the said Court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

Now, the Condition of the above obligation is such, that if the said Morris Levy shall prosecute said appeal to
507 effect and answer and pay all damages and costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

MORRIS LEVY [Seal]
HERMAN COHN [Seal]

Sealed and delivered in presence of
John C. Wharton.

Approved this 12th day of June, 1903.

By W. H. MUNGER, Judge.

Indorsed: Filed Jun 12 1903. Geo. H. Thummel, Clerk.

In the Circuit Court of the United States, in and for the
508 District of Nebraska.

Sumner Wallace, Complainant,
Doc. T. vs. No. 261.
American National Bank, et al., Defendants.

Bond on Appeal.

Know All Men By These Presents. That we, John N. Frenzer, principal, and Joseph P. Frenzer, surety, are held and firmly bound unto the Union National Bank of Omaha, Nebraska, in the full and just sum of $650.00 to be paid to the said Union National Bank of Omaha, Nebraska, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this Eighth day of June in the Year of our Lord One Thousand Nine Hundred and Three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska in a suit pending in said court, wherein Sumner Wallace was plaintiff and the said Union National Bank of Omaha was one of the defendants, and said John N. Frenzer was one of the defendants, a decree was rendered against the said John N. Frenzer and the said John N. Frenzer has obtained an order of the said court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

Now, the condition of the above obligation is such,
509 that if the said John N. Frenzer shall prosecute said appeal to effect and answer and pay all damages and costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

JOHN N. FRENZER [Seal]
Sealed and delivered in JOSEPH P. FRENZER [Seal]
presence of John H. Voss.

Approved this 12th day of June 1903.
By W. H. MUNGER, Judge.

Indorsed: Filed Jun 12 1903. Geo. H. Thummel, Clerk.

510 In the Circuit Court of the United States in and for the District of Nebraska.

Sumner Wallace, Complainant,
No. 261. vs. Doc. T.
American National Bank, et al. Defendants.

Bond on Appeal.

Know All Men by These Presents:

That we John N. Frenzer principal, and Joseph P. Frenzer surety, are held and firmly bound unto Sumner Wallace in the full and just sum of $350.00 to be paid to the said Sumner Wallace, his heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with [out] seals and dated this 8th day of June in the year of our Lord, One Thousand Nine Hundred and Three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska in a suit pending in said Court, wherein Sumner Wallace was plaintiff and said John N. Frenzer was one of the defendants, a decree was rendered against the said John N. Frenzer and the said John N. Frenzer has obtained an order of the said Court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

Now, the Condition of the above obligation is such, that if the said John N. Frenzer shall prosecute said appeal
511 to effect and answer and pay all damages and costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

JOHN N. FRENZER. [Seal]
Sealed and delivered in JOSEPH P. FRENZER. [Seal]
presence of John H. Voss.

Approved this 12th day of June, 1900,
By W. H. MUNGER, Judge.

Indorsed: Filed Jun 12 1903. Geo. H. Thummel, Clerk.

512 In the Circuit Court of the United States, in and for the District of Nebraska.

Sumner Wallace, Complainant,
No. 261. vs. Doc. T.
American National Bank, et al. Defendants.

Bond on Appeal.

Know All Men by These Presents:

That we, Peter Frenzer principal, and Joseph P. Frenzer surety, are held and firmly bound unto the Union National Bank of Omaha, Nebraska, in the full and just sum of $1500.00 to be paid to the said Union National Bank of Omaha, Nebraska, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this Eighth day of June in the Year of our Lord One Thousand Nine Hundred and Three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska in a suit pending in said court, wherein Sumner Wallace was plaintiff and the said Union National Bank of Omaha was one of the defendants, and said Peter Frenzer was one of the defendants, a decree was rendered against the said Peter Frenzer and the said Peter Frenzer has obtained an order of the said court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

513 Now, the condition of the above obligation is such, that if the said Peter Frenzer shall prosecute said appeal to the effect and answer and pay all damages and costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

PETER FRENZER [Seal]
Sealed and delivered in JOS. P. FRENZER [Seal]
presence of John H. Voss.

Approved this 12th day of June, 1903.

By W. H. MUNGER, Judge.

Indorsed: Filed Jun 12, 1903. Geo. T. Thummel, Clerk.

514 In the Circuit Court of the United States in and for the District of Nebraska.

Sumner Wallace, Complainant,
Doc. T. No. 261. vs.
American National Bank, et al., Defendants.

Bond on Appeal.

Know All Men By These Presents,

That we Peter Frenzer principal, and Joseph P. Frenzer, surety, are held and firmly bound unto Sumner Wallace in the full and just sum of $600.00 to be paid to the said Sumner Wallace, his heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by th-se presents.

Sealed with [out] seals and dated this 8th day of June in the year of our Lord, One Thousand Nine Hundred and Three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska in a suit pending in said Court, wherein Sumner Wallace was plaintiff and said Peter Frenzer was one of the defendants, a decree was rendered against the said Peter Frenzer and the said Peter Frenzer has obtained an order of the said Court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

Now, the Condition of the above obligation is such, that if the said Peter Frenzer shall prosecute said appeal to
515 effect and answer and pay all damages and costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

PETER FRENZER. [Seal]
Sealed and delivered in presence of JOS. P. FRENZER. [Seal]
John H. Voss.

Approved this 12th day of June, 1903.

By W. H. MUNGER, Judge.

Indorsed: Filed Jun. 12, 1903. Geo. H. Thummel, Clerk.

516 In the Circuit Court of the United States, in and for the District of Nebraska.

Sumner Wallace, Complainant,
Doc. T. No. 261. vs.
American National Bank, et al., Defendants.

Bond for Appeal.

Know All Men By These Presents:

That we, Charles C. George, principal, and United States Fidelity and Guaranty Company of Baltimore, surety, are held and firmly bound unto the Union National Bank, of Omaha, Nebraska, in the full and just sum of $1500.00 to be paid to the said Union National Bank of Omaha, Nebraska, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of June in the year of our Lord, One Thousand Nine Hundred and Three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska, in a suit pending in said court, wherein Sumner Wallace was plaintiff and the said Union National Bank of Omaha was one of the defendants, and said Charles C. George was one of the defendants, a decree was rendered against the said Charles C. George and the said Charles C. George has obtained an order of the said Court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

517 Now, the condition of the above obligation is such, that if the said Charles C. George shall prosecute said appeal to effect and answer and pay all damages and costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

CHARLES C. GEORGE.
THE UNITED STATES FIDELITY
AND GUARANTY COMPANY, [Seal]
Sealed and delivered in presence of Ross B. Towle. By B. L. Baldwin,
E. G. McGilton, [Seal]
[Seal] Its Attorneys in fact.

Approved this 12th day of June, 1903.

By W. H. MUNGER, Judge.

Indorsed: Filed Jun. 12, 1903. Geo. H. Thummel, Clerk.

518 In the Circuit Court of the United States, in and for the District of Nebraska.

Sumner Wallace, Complainant,
Doc. T. vs. No. 261.
American National Bank, et al., Defendants.

Bond for Appeal.

Know All Men By These Presents:

That we, Charles C. George, principal, and United States Fidelity and Guaranty Company of Baltimore, surety, are held and firmly bound unto Sumner Wallace in the full and just sum of $600.00 (Six Hundred Dollars) to be paid to the said Sumner Wallace, his heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of June in the year of our Lord, One Thousand Nine Hundred and Three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska, in a suit pending in said court, wherein Sumner Wallace was plaintiff and the said Union National Bank of Omaha was one of the defendants, and said Charles C. George was one of the defendants, a decree was rendered against the said Charles C. George and the said Charles C. George has obtained an order of the said Court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

519 Now, the condition of the above obligation is such, that if the said Charles C. George shall prosecute said appeal to effect and answer and pay all damages and costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

CHARLES C. GEORGE,
THE UNITED STATES FIDELITY AND
GUARANTY COMPANY, [Seal]
By B. L. Baldwin,
E. G. McGilton, [Seal]
Its Attorneys in fact.

Sealed and delivered in presence of Ross B. Towle. [Seal]

Approved this 12th day of June, 1903.
By W. H. MUNGER, Judge.

Indorsed: Filed Jun. 12, 1903. Geo. H. Thummel, Clerk.

520 In the Circuit Court of the United States, in and for the District of Nebraska.

Sumner Wallace, Complainant,
Doc. T. vs. No. 261.
American National Bank, et al., Defendants.

Bond for Appeal.

Know All Men By These Presents,

That we, George G. Wallace principal, and E. R. Hume surety, are held and firmly bound unto Sumner Wallace and the Union National Bank of Omaha, Nebraska, in the full and just sum of $200.00 to be paid to the said Sumner Wallace, his heirs, executors, administrators or assigns and the Union National Bank of Omaha, Nebraska, its successors or assigns, to which payment well and truly to be made we bind ourselves our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of June in the year of our Lord, One Thousand Nine Hundred and Three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska, in a suit pending in said court, wherein Sumner Wallace was plaintiff and the said Union National Bank of Omaha was one of the defendants, and said George G. Wallace was one of the defendants a decree was rendered against the said George G. Wallace and the said George G. Wallace has obtained an order of the said court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

521 Now, the condition of the above obligation is such, that if the said George G. Wallace shall prosecute said appeal to effect and answer and pay all costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

GEORGE G. WALLACE, [Seal]
E. R. HUME [Seal]

Sealed and delivered in presence of
C. J. Edwards.

Approved this 12th day of June 1900.
By W. H. MUNGER, Judge.

Indorsed: Filed Jun. 12, 1903. Geo. H. Thummel, Clerk.

In the Circuit Court of the United States, in and for the
522 District of Nebraska.

Sumner Wallace, Complainant,
Doc. T.—No. 261. vs.
American National Bank, et al., Defendants.

Bond for Appeal.

Know all Men by These Presents, That we, Elmer C. Brownlee, principal, and Jacob Kopp surety, are held and firmly bound unto Sumner Wallace and the Union National Bank of Omaha, Nebraska, in the full and just sum of $200.00 to be paid to the said Sumner Wallace, his heirs, executors, administrators or assigns and the Union National Bank of Omaha, Nebraska, its successors or assigns, to which payment well and truly to be made we bind ourselves our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of June in the year of our Lord, One Thousand Nine Hundred and Three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska, in a suit pending in said court, wherein Sumner Wallace was plaintiff and the said Union National Bank of Omaha was one of the defendants, and said Elmer C. Brownlee, was one of the defendants a decree was rendered against the said Elmer C. Brownlee and the said Elmer C. Brownlee has obtained an order of the said court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

523 Now, the condition of the above obligation is such, that [iff] the said Elmer C. Brownlee shall prosecute said appeal to effect and answer and pay all costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

ELMER C. BROWNLEE [Seal]
JACOB KOPP. [Seal]

Sealed and delivered in
presence of Josephine Rosenbaum.

Approved this 12th day of June, 1903.
By W. H. MUNGER, Judge.

Indorsed: Filed Jun 12 1903. Geo. H. Thummel, Clerk.

In the Circuit Court of the United States, in and for the
524 District of Nebraska.

Sumner Wallace, Complainant,
Doc. T.—No. 261. vs.
American National Bank, et al., Defendants.

Bond for Appeal.

Know all Men by These Presents, That we, Albert U. Wyman principal, and Randall K. Brown, surety, are held and firmly bound unto Sumner Wallace and the Union National Bank of Omaha, Nebraska, in the full and just sum of $200.00 to be paid to the said Sumner Wallace, his heirs, executors, administrators or assigns and the Union National Bank of Omaha, Nebraska, its successors or assigns, to which payment well and truly to be made we bind ourselves our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of June in the year of our Lord, One Thousand Nine Hundred and Three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska, in a suit pending in said court, wherein Sumner Wallace was plaintiff and the said Union National Bank of Omaha was one of the defendants, and said Albert U. Wyman was one of the defendants a decree was rendered against the said Albert U. Wyman and the said Albert U. Wyman has obtained an order of the said court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

525 Now, the condition of the above obligation is such, that if the said Albert U. Wyman, shall prosecute said appeal to effect and answer and pay all costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

ALBERT U. WYMAN, [Seal]
Sealed and delivered in RANDALL K. BROWN, [Seal]
presence of T. F. Swift

Approved this 12th day of June, 1903.
By W. H. MUNGER, Judge.

Indorsed: Filed Jun 12 1903. Geo. H. Thummel, Clerk.

In the Circuit Court of the United States, in and for the
526 District of Nebraska.

Sumner Wallace, Complainant,
Doc. T.—No. 261. vs.
American National Bank, et al., Defendants.

Bond for Appeal.

Know all Men by These Presents, That we, Henry F. Wyman principal, and Randall K. Brown, surety, are held and firmly bound unto Sumner Wallace and the Union National Bank of Omaha, Nebraska, in the full and just sum of $200.00 to be paid to the said Sumner Wallace, his heirs, executors, administrators or assigns and the Union National Bank of Omaha, Nebraska, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 11 day of June, in the year of our Lord, One Thousand Nine Hundred and Three.

Whereas, lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska, in a suit pending in said court, wherein Sumner Wallace was plaintiff and the said Union National Bank of Omaha was one of the defendants, and said Henry F. Wyman was one of the defendants a decree was rendered against the said Henry F. Wyman and the said Henry F. Wyman has obtained an order of the said Court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

527 Now, the condition of the above obligation is such, that if the said Henry F. Wyman shall prosecute said appeal to effect and answer and pay all costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

HENRY F. WYMAN [Seal]
Sealed and delivered RANDALL K. BROWN [Seal]
in presence of
T. F. Swift.

Approved this 12th day of June, 1903.

By W. H. MUNGER, Judge.

Indorsed: Filed Jun 12, 1903. Geo. H. Thummel, Clerk.

528 In the Circuit Court of the United States, in and for the District of Nebraska.

Sumner Wallace, Complainant,
No. 261. vs. Doc. T.
American National Bank, et al. Defendants.

Bond for Appeal.

Know All Men by These Presents,

That we, Howard B. Smith, principal, and Fidelity & Deposit Co. of Maryland surety, are held and firmly bound unto Sumner Wallace, and the Union National Bank of Omaha, Nebraska, in the full and just sum of $200.00 to be paid to the said Sumner Wallace, his heirs, executors, administrators or assigns and the Union National Bank of Omaha, Nebraska, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 11 day of June in the year of our Lord, One Thousand Nine Hundred and Three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska, in a suit pending in said court, wherein Sumner Wallace was plaintiff and the said Union National Bank of Omaha was one of the defendants, and said Howard B. Smith was one of the defendants a decree was rendered against the said Howard B. Smith and the said Howard B. Smith has obtained an order of the said Court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

529 Now, the condition of the above obligation is such, that if the said Howard B. Smith shall prosecute said appeal to effect and answer and pay all [all] costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

HOWARD B. SMITH [Seal]
FIDELITY & DEPOSIT CO.
OF MARYLAND [Seal]
[Seal] By A. Wagner, Agent and Attorney in fact.

Sealed and delivered in
presence of Harry L. Byrne.

Approved this 12th day of June 1903.
By W. H. MUNGER, Judge.

Indorsed: Filed Jun 12, 1903. Geo. H. Thummel, Clerk.

530 Thereupon afterwards, to-wit: On the said 12th day of June, 1903, Justifications of Surety for the defendants, Wallace, Peter & John N. Frenzer, Morris Levy, Albery U. & Henry F. Wyman and Elmer C. Brownlee, which said Justifications are in words and figures following, to-wit:

In the U. S. Circuit Court District of Nebraska.

Sumner Wallace, Plaintiff,
No. 261. vs. Doc. T.
American National Bank, et al., Defendants

State of Nebraska,
Douglas County—ss.

E. R. Hume being duly sworn, says that he is a proposed surety for George G. Wallace in the above entitled action, and that he is a resident and freeholder of said County; that he has a freehold Estate in land situate in said County, of the value of $2000.00 over and above all liens and incumbrances thereon, and exclusive of any homestead or other land exempt from exe-ution; and that he is worth in personal property situate in said County, the sum of $..... over and above all his debts, liabilities and responsibilities, and exclusive of personal property exempt from execution; and that he is worth in other real and personal property situate in said State, the sum of $..... over and above all liens and incumbrances thereon, and beyond all his debts and liabilities, and exclusive of property exempt from execution.

E. R. HUME.

Sworn to before me and signed in my presence this 11th day of June, A. D. 1903.

FRANK L. McCOY,
[Seal] Notary Public.

My commission expires Jany. 22 1905.

Indorsed: Filed Jun 12, 1903. Geo. H. Thummel, Clerk.

531 In the U. S. Circuit CourtDistrict of Nebraska.

Sumner Wallace, Plaintiff,
Doc. T. No. 261. vs.
American National Bank, et al., Defendants.

State of Nebraska,
Douglas County—ss.

Jos. P. Frenzer being duly sworn, says that he is a proposed surety for Peter Frenzer and John N. Frenzer in the above entitled action, and that he is a resident and freeholder of said

County; that he has a freehold Estate in land situate in said County, of the value of $400.00 over and above all liens and incumbrances thereon, and exclusive of any homestead or other land exempt from execution; and that he is worth in personal property situate in said County, the sum of $20,000.00 over and above all his debts, liabilities and responsibilities, and exclusive of personal property exempt from execution; and that he is worth in other real and personal property situate in said State, the sum of $..... over and above all liens and incumbrances thereon, and beyond all his debts and liabilities, and exclusive of property exempt from execution.

JOS. P. FRENZER.

Sworn to before me and signed in my presence this 8th day of June, A. D. 1903.

[Seal] C. H. RIEPEN,
Notary Public.

Indorsed: Filed Jun. 12, 1903. Geo. H. Thummel, Clerk.

532 In the U. S. Circuit Court District of Nebraska.

Sumner Wallace, Plaintiff,
Doc. T. No. 261. vs.
American National Bank, et al., Defendants.

State of Nebraska,
County of Douglas—ss.

Herman Cohn, being duly sworn, says that he is a proposed surety for Morris Levy in the above entitled action, and that he is a resident and freeholder of said County; that he has a freehold Estate in land situate in said County, of the value of $12000.00 over and above all liens and incumbrances thereon, and exclusive of any homestead or other land exempt from execution; and that he is worth in personal property situate in said County, the sum of $12,000.00 over and above all his debts, liabilities and responsibilities, and exclusive of personal property exempt from execution; and that he is worth in other real and personal property situate in said State, the sum of $12000.00 over and above all liens and incumbrances thereon, and beyond all his debts and liabilities, and exclusive of property exempt from execution.

HERMAN COHN.

Sworn to before me and signed in my presence this 9th day of June, A. D. 1903.

[Seal] JOHN C. WHARTON,
Notary Public.

Indorsed: Filed Jun. 12, 1903. Geo. H. Thummel, Clerk.

533 In the U. S. Circuit Court District of Nebraska.

Sumner Wallace, Plaintiff,
Doc. T. No. 261. vs.
American National Bank, et al., Defendants.

State of Nebraska,
County of Douglas—ss.

Randall K. Brown, being duly sworn, says that he is a proposed surety for Albert U. Wyman & Henry F. Wyman in the above entitled action, and that he is a resident and freeholder of said County; that he has a freehold Estate in land situate in said County, of the value of $800.00 over and above all liens and incumbrances thereon, and exclusive of any homestead or other land exempt from execution; and that he is worth in personal property situate in said County, the sum of $800.00 over and above all his debts, liabilities and responsibilities, and exclusive of personal property exempt from execution; and that he is worth in other real and personal property situate in said State, the sum of $800.00 over and above all liens and incumbrances thereon, and beyond all his debts and liabilities and exclusive of property exempt from execution.

RANDALL K. BROWN.

Sworn to before me, and signed in my presence this 11th day of June, A. D. 1903.

[Seal] JOHN D. WEAR,
Notary Public.

Indorsed: Filed Jun. 12, 1903. Geo. H. Thummel, Clerk.

534 In the U. S. Circuit Court District of Nebraska.

Sumner Wallace, Plaintiff,
Doc. T. No. 261. vs.
American National Bank, et al., Defendants.

State of Nebraska,
County of Douglas—ss.

Jacob Kopp being duly sworn, says that he is a proposed surety for Elmer C. Brownlee in the above entitled action, and that he is a resident and freeholder of said County; that he has a freehold Estate in land situate in said County, of the value of $1000.00 over and above all liens and incumbrances thereon, and exclusive of any homestead or other land exempt from execution; and that he is worth in personal property situate in said County, the sum of $1000.00 over and above all his debts, liabilities and responsibilities, and exclusive of personal property exempt from execution; and that he is worth in other real and

personal property situate in said State, the sum of $1000.00 over and above all liens and incumbrances thereon, and beyond all his debts and liabilities and exclusive of property exempt from execution.

JACOB KOPP.

Sworn to before me, and signed in my presence this 11th day of June, A. D. 1903.

[Seal] CHARLES L. DEUEL,
Notary Public.

Indorsed: Filed Jun. 12, 1903. Geo. H. Thummel, Clerk.

535 Thereupon afterwards, to-wit: On the 1st day of July, 1903, Precipe for Transcript on Appeal was filed in said case by Howard B. Smith, which said Precipe is in words and figures following, to-wit:

In the Circuit Court of the United States, in and for the District of Nebraska.

Sumner Wallace, Complainant,
No. 261. vs. Doc. T.
The American National Bank, et al., [Complainant].

Precipe.

To the Clerk of said Court:

Please make a transcript of the following parts of the record in the above entitled case for appeal to the United States Court of Appeals, to-wit:

1. The Bill of Complaint filed August 18, 1898.
2. Memorandum Opinion of Judge Munger filed Sept. 29, 1899.
3. Motion to appoint James Burness, Trustee, filed Dec. 5, 1899.
4. The order appointing James Burness, Trustee, entered January 8, 1900.
5. The order granting leave to file amended bill, entered Feb. 7, 1900.
6. The Amended Bill filed Feb. 17th, 1900, and refiled Jan. 8, 1901.
7. The order granting leave to re-file amended bill, etc., entered Jan. 8, 1901.
8. The Joint and several answer of Elmer C. Brownlee, Peter Frenzer, John N. Frenzer and Howard B. Smith, filed Feb. 4, 1901.

536 9. The Joint and several answer of Charles C. George, Henry F. Wyman, Albert U. Wyman and Morris Levy, filed Feb. 4, 1901.

10. The Answer to the Union National Bank filed Aug. 2, 1901.

11. The Replication to the answers of all the defendants, filed Aug. 2, 1901.

12. All the evidence and depositions.

13. The stipulation that the answer of Brownlee et al., would serve as the answer of George G. Wallace also, filed July 1, 1902.

14. The Journal Entry of July 1, 1902, showing case heard on proofs and submitted.

15. Memorandum of Opinion of Judge Munger filed Sept. 1, 1902.

16. Order confirming sale by James Burness, Trustee, entered Dec. 9, 1902.

17. The order confirming the Final Report of James Burness, Trustee, entered Jan. 3, 1903.

18. The Memorandum of Opinion of Judge Munger filed April 24, 1903.

19. The Decree entered May 23, 1903.

20. The petition for appeal, and the assignment of errors filed May 23, 1903, by Elmer C. Brownlee, et al.

21. The order allowing the appeal of Elmer C. Brownlee, et al., entered May 23, 1903.

22. The several bonds filed by Elmer C. Brownlee, George C. Wallace, Charles C. George, Peter Frenzer, Howard B. Smith, Henry F. Wyman, Albert U. Wyman, Morris Levy and John Frenzer.

23. This Precipe and Notice.

HOWARD B. SMITH,

Solicitor for Elmer C. Brownlee, George G. Wallace, Charles C. George, Peter Frenzer, Howard B. Smith, John N. Frenzer, Henry F. Wyman, Albert U. Wyman and Morris Levy, Defendants.

To Sumner Wallace, complainant, and the Union National Bank of Omaha, Defendant:

Please Take Notice that Elmer C. Brownlee, George
537 G. Wallace, Charles C. George, Peter Frenzer, John N. Frenzer, Howard B. Smith, Henry F. Wyman, Albert U. Wyman and Morris Levy, defendants in the above entitled cause, deem the parts of the record specified in the foregoing precipe all that is necessary for the hearing of their and each of their appeal in the United States Circuit Court of Appeals for the Eighth Circuit.

HOWARD B. SMITH,
Solicitor for said defendants.

Received a copy of the foregoing Precipe and notice this 12th day of June, 1903.

J. H. MACOMBER,
HALL & McCULLOCH,
Solicitors and of counsel for said Sumner Wallace, and said Union National Bank, of Omaha.

Indorsed: Filed Jul. 1, 1903. Geo. H. Thummel, Clerk.

538 Thereupon afterwards, to-wit: On the 23rd day of May, 1903, a Petition for Appeal and Assignment of Errors was filed in said case, which said Petition is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

Sumner Wallace,
No. 261. vs. Doc. T.
American National Bank, et al.

Petition for Appeal and Assignment of Errors.

To the Court:

William S. Poppleton, one of the defendants in the above entitled cause, shows that the final decree herein adjudges him to pay to the complainant the sum of $1308.37 and to pay the Union National Bank the sum of $4160.81; that said final decree is prejudicial and erroneous as follows, to-wit:

Assignment of Errors.

(1) The Circuit Court erred in rendering the decree against this defendant because said Court has not jurisdiction of said cause, that is to say: the complainant, sues as the assignee of a chose in action, to-wit: a non-negotiable promissory note executed by the American National Bank of Omaha as maker and in favor of Union National Bank of Omaha as payee each of whom was at the time of the execution and delivery of said note and at the time of the filing of the original and amended bills a citizen and resident of the State of Nebraska.

(2) The Circuit Court erred in rendering the decree against this defendant because said court had not jurisdiction of
539 said cause, that is to say; the said American National Bank had not gone into voluntary liquidation pursuant to section 5220 of the Revised Statutes of the United States at any time prior to the rendition of said decree.

(3) The Circuit Court erred in rendering said decree against this defendant because said court had not jurisdiction of the cause that is to say: the complainant had not reduced his claim to judgment against the American National Bank and exhausted his remedy at law.

(4) The Circuit Court erred in rendering said decree against this defendant and in adjudging this defendant to pay to the complainant Sumner Wallace the sum of $1308.37 because the agreement between the American National Bank and the Union National Bank, dated Dec. 21, 1893, a copy of which is attached to the Amended Bill of Complainant as Exhibit "A" and the alleged promissory note set out in the said bill are ultra vires and void and create no liability for which shareholders are responsible.

(5) The Circuit Court erred in rendering the said decree against this defendant and in adjudging this defendant to pay the said complainant the sum of $1308.37 because the obligation of the American National Bank sued on is not an obligation incurred, contracted or assumed in the course of the business of banking.

(6) The Circuit Court erred in rendering said decree against this defendant and in adjudging this defendant to pay the sum of $4160.81 to the Union National Bank, because the Agreement between the American National Bank and the Union National Bank dated Dec. 21, 1895, a copy of which is attached to the Amended Bill of Complaint and the alleged promissory
540 notes set out in the answer or claim of the Union National Bank are ultra vires and void and create no liability for which shareholders are responsible.

(7) The Circuit Court erred in rendering said decree and in adjudging this defendant to pay to the Union National Bank the sum of $4160.81 because the claim of the said Union National Bank is founded upon an alleged obligation of the American National Bank which was not incurred, assumed or contracted in the business of banking.

(8) The Circuit Court erred in rendering the said decree and in adjudging this defendant to pay to the Union National Bank the sum of $4160.81 because said court had not jurisdiction of this defendant as to said claim.

(9) The Circuit Court erred in not rendering a decree for this defendant.

Wherefore this defendant prays that an appeal be allowed with supersedeas and for a citation.

WILLIAM S. POPPLETON,
By Richard S. Horton, Solicitor.

Indorsed: Filed May 23, 1903. Geo. H. Thummel, Clerk.

541 Thereupon afterwards, to-wit: On the 25th day of May, 1903, the Bond of William S. Poppleton in favor of Sumner Wallace was filed in said case, which said Bond is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

Sumner Wallace,
v.
American National Bank, et al.

Bond.

Know All Men By These Presents, that we, William S. Poppleton as principal and American Surety Company of New York, as surety, are jointly and severally held and firmly bound unto Sumner Wallace, his heirs, executors and administrators, in the penal sum of $1500.00 in lawful money of the United States well and truly to be paid.

The condition of the foregoing obligation is such that Whereas the above bounden William S. Poppleton has appealed from the decree and judgment of the Circuit Court of the United States for the District of Nebraska in a certain cause therein pending wherein Sumner Wallace is complainant and William S. Poppleton is a defendant, and

Whereas, judgment was rendered against said William S. Poppleton, for the sum of $1308.37 in favor of Sumner Wallace;

Now therefore if the said William S. Poppleton, appellant in said cause, shall prosecute his said appeal to effect and answer and pay all damages and costs if he fail to make good his plea, then this obligation to be null and void, but otherwise in full force and virtue.

542 Witness our hands this 23 day of May, 1903.

WILLIAM S. POPPLETON,
AMERICAN SURETY COMPANY
OF NEW YORK,
By H. W. Yates, Resident Vice-Prest.
[Seal] Attest: Philip Potter, Resident Asst. Sec'y.

Bond & surety approved.
W. H. MUNGER, Judge.

Indorsed: Filed May 25, 1903. Geo. H. Thummel, Clerk.

543 Thereupon afterwards, to-wit: On the 25th day of May, 1903 the Bond of William S. Poppleton in favor of Union National Bank was filed in said case, which said Bond is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

Sumner Wallace,
v.
American National Bank, et al.

Bond.

Know All Men by These Presents that we, William S. Poppleton, as principal and American Surety Company of New York, as surety, are jointly and severally held and firmly bound unto the Union National Bank, its successors and assigns, in the penal sum of $4500.00 in lawful money of the United States, well and truly to be paid.

The condition of the foregoing obligation is such that

Whereas the above bounden William S. Poppleton has appealed from the decree and judgment of the Circuit Court of the United States for the District of Nebraska in a certain cause therein pending wherein Sumner Wallace is complainant and William S. Poppleton is a defendant, and

Whereas judgment was rendered against said William S. Poppleton for the sum of $4160.81 in favor of the Union National Bank;

Now therefore if the said William S. Poppleton, appellant in said cause, shall prosecute his said appeal to effect and answer and pay all damages and costs if he fail to make good his plea, then this obligation to be null and void, but otherwise to remain in full force and virtue.

544 Witness our hands this 23 day of May, A. D. 1903.

WILLIAM S. POPPLETON.
[Seal] AMERICAN SURETY COMPANY OF NEW YORK.
By H. W. Yates, Resident Vice-Prest.
Attest: Philip Potter, Resident Asst. Secy.

Bond and surety approved.

W. H. MUNGER.

Indorsed: Filed May 25 1903. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 1st day of July,
545 1903 a Praecipe for Transcript on Appeal of William S. Poppleton was filed in said case, which said Praecipe is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

Sumner Wallace,
Doc. T.—No. 261. vs.
American National Bank, et al.

Praecipe for Transcript on Appeal of William S. Poppleton.

To the Clerk of said Court:—

Please make a transcript of the following parts of the record in the above entitled cause for appeal to the United States Circuit Court of Appeals, to-wit:

(1) The original bill, filed August 18, 1898.

(2) The memorandum of opinion of Judge Munger filed Sep. 29, 1899.

(3) The motion to appoint James Burness trustee, filed Dec. 5, 1899.

(4) The order appointing James Burness trustee, entered Jan. 8, 1900.

(5) Order granting leave to complainant to file amended bill of complaint, entered February 7, 1900.

(6) The amended bill of complaint, endorsed Filed Feby. 17, 1900, also endorsed, Re-filed Jany 8, 1901.

(7) Order granting leave to refile amended bill of complaint entered Jany. 8, 1901.

(8) The separate answer of William S. Poppleton to the amended bill of complaint filed Feby 12, 1901.

(9) The answer of Union National Bank to the amended bill of complaint, filed August 2, 1901.

(10) The general replication to the answers of all defendants, filed August 2nd, 1901.

546 (11) All of the evidence and depositions.

(12) Record entry July 1st, 1902, showing the case heard on proofs and submitted.

(13) The memorandum of opinion of Judge Munger filed Sep. 1, 1902.

(14) The order confirming sale of assets entered Dec. 9, 1902.

(15) The order confirming final report of Burness as trustee, entered Jan. 3, 1903.

(16) Memorandum opinion of Judge Munger, filed April 24th, 1903.

(17) The final decree entered May 23rd, 1903.

(18) The petition for appeal and assignment of errors of William S. Poppleton, filed May 23rd, 1903.

(19) The supersedeas bond of William S. Poppleton in favor of Sumner Wallace filed May 23rd, 1903.

(20) The supersedeas bond of William S. Poppleton in favor of Union National Bank filed May 23rd, 1903.

(21) This praecipe and notice.

RICHARD S. HORTON,
Attorney for William S. Poppleton.

Indorsed: Filed Jul 1 1903. Geo. H. Thummel, Clerk.

547 Thereupon afterwards, to-wit: On the 4th day of June, 1903 an Assignment of Errors was filed in said case, which said Assignment of Errors is in words and figures following, to-wit:

In the Circuit Court of the United States in and for the District of Nebraska.

Sumner Wallace, Complainant,
Doc. T—No. 261. vs. In Equity.

American National Bank, a corporation, The McCague Investment Company, a corporation, Thomas H. McCague, Alex G. Charlton, Elmer C. Brownlee, Elizabeth Dufrene, Executrix of the last Will and Testament of Alfred R. Dufrene, Deceased, Edgar M. Morsman, Philip Mergin, George G. Wallace, William S. Poppleton, John S. King, William Wallace, Charles F. Manderson, Anna C. Crowell, Charles C. George, Robert H. McClellan, Peter Frenzer, John N. Frenzer, Charles H. Walworth, Frank W. Wessels, Frank Graham, James H. McCulloch, John P. Charlton, C. W. Morton, Royal Wilsen, Jacob Wead, James J. Brown, Jr., James J. Woodward, Viola Coffin, Howard B. Smith, Edward G. Glenn, Emily J. Robinson, James H. Morton, George Morton, Mary E. Morton, William Wilson, Henry F. Wyman, Albert U. Wyman, F. R. McConnell, Trustee, John Speer, John E. Patrick, R. L. Brownlee, Caroline Carpenter, William C. Beer, Marcus C. Acheson, George Marples, Arthur H. Flack, Meade C. Williams, James H. Conrad, T. R. Neal, J. H. Hawkins, William Baird, The Manufacturers' National Bank, of Boston, Mass., a corporation, John L. McCague, Morris Levy, National Bank Building Company of America, a corporation, John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners doing business under the firm name and style of McCague Bros., Rufus B. Bullock, Thomas L. Kimball,

Thomas L. Kimball, Trustee, Alex. G. Charlton, Secretary, Samuel Blackwell, and the Union National Bank of Omaha, Nebraska, Defendants.

Assignment of Errors.

548 And now on this 4th day of June, 1903, Charles W. Morton, James H. Morton, George Morton and Mary E. Morton, defendants in the above entitled action, come, and each of them comes, by their solicitor and say, and each of them says, that the decree in said cause is erroneous and against the just rights of these defendants and each of them for the following reasons, to-wit:

1. That said Circuit Court did not have jurisdiction over these defendants or either of them, because the complainant sued as the assignee of a chose in action, to-wit: (a non-negotiable promissory note) given by said American National Bank of Omaha, Nebraska, to said Union National Bank of Omaha, Nebraska, and each of these defendants is a citizen and resident of Nebraska.

2. That said Circuit Court did not have jurisdiction of said cause, or of these defendants, or either of them, under the Act of Congress of June 30, 1876 (Supp. U. S. Rev. Stats. 107), because said American National Bank of Omaha had not gone into voluntary liquidation within the meaning of Sec. 5220 of the U. S. Revised Statutes or of any other of the banking laws of the United States; for the reason that said bank has no assets in its possession or under its control at the time certain of the shareholders of said bank voted to go into voluntary liquidation.

3. That said Circuit Court did not have jurisdiction of said cause or of these defendants or either of them, under said Act of Congress of June 30, 1876, even if said American National Bank of Omaha had gone into voluntary liquidation, because said Amended Bill does not allege that complainant or his assignor ever "presented his notes or other claims against the Association for Payment" as provided in Section 5221 of the U. S. Revised Statutes.

549 4. That said Circuit Court did not have jurisdiction of said cause or of these defendants, or either of them, under the Act of Congress of June 30, 1876 (Supp. U. S. Rev. Stats. 107) because the complainant had not obtained judgment at law upon the note held by him and had not caused an execution to be issued thereon and returned nulla bona, and, therefore, did not and could not file in said court a bill in equity in the nature of a creditor's [vill], as provided in said act.

5. Because the court finds and the decree adjudges that there is due from the American National Bank and the stockholders thereof to Sumner Wallace, complainant, upon the contract set out in the amended bill and the first of said notes, also set out in said amended bill, the sum of $46,524.83.

6. Because the court finds and the decree adjudges that there is due to said Union National Bank from said American National Bank and the stockholders thereof the sum of $147,941.52.

7. Because the court finds and the decree adjudges that each of these defendants is liable to the said Sumner Wallace and to the said Union National Bank in the sum set opposite his name, as follows:

From Charles W. Morton to the complainant, Sumner Wallace, the sum of	$139.56	
From Charles W. Morton to the said Union National Bank, the sum of		$443.82
From James H. Mortron to the complainant Sumner Wallace, the sum of	$ 46.52	
From James H. Morton to the said Union National Bank, the sum of		$147.94
From George Morton to the complainant, Sumner Wallace, the sum of	$ 23.26	
From George Morton to the said Union National Bank, the sum of		$ 73.97
350 From Mary E. Morton to the complainant, Sumner Wallace, the sum of	$ 23.26	
From Mary E. Morton to the said Union National Bank, the sum of		$ 73.97

8. Because the decree adjudges that the complainant, Sumner Wallace, have and recover of each of these defendants the sum set opposite his name, to-wit:

From Charles W. Morton the sum of	$ 139.56
From James H. Morton the sum of	" 46.52
From George Morton the sum of	" 23.26
From Mary E. Morton the sum of	" 23.26

9. Because the decree adjudges that the Union National Bank have and recover of each of these defendants the sum set opposite his name, to-wit:

From Charles W. Morton the sum of	$443.82
From James H. Morton the sum of	147.94
From George Morton the sum of	73.97
From Mary E. Morton the sum of	73.97

10. [Beacuse] the decree adjudges that the said Sumner Wallace and said Union National Bank have judgment against each of these defendants for the costs taxed at $..... against each of them.

11. Because the decree adjudges that execution be issued against each of these defendants.

12. Because the decree did not adjudge that each of these defendants was not liable to the complainant, Sumner Wallace, in any sum whatever.

13. Because the decree did not adjudge that each of these defendants was not liable to said Union National Bank of Omaha in any sum whatever.

14. Because the decree did not adjudge that each and all of these defendants, shareholders of the American Na-
551 tional Bank of Omaha, was and were not liable in said action to said Union National Bank of Omaha, for the reason that said Union National Bank did not file a cross bill in said action or otherwise plead therein, except by an answer to the amended bill of complaint.

15. Because the decree did not adjudge that said American National Bank of Omaha was not indebted to said Union National Bank of Omaha before or at the time of the execution and delivery of the three notes in said amended bill described.

16. Because the decree did not adjudge that the execution and delivery of the contract or agreement set forth in the amended bill was ultra vires said American National Bank of Omaha.

17. Because the decree did not adjudge that the borrowing of money ($201,000.00) alleged in the amended bill from said Union National Bank by said American National Bank was ultra vires said American National Bank.

18. Because the decree did not adjudge that the execution and delivery of each of the three non-negotiable notes, due one, two and three years after date and drawing interest at 6% per annum from date, described in the amended bill, was ultra vires said American National Bank of Omaha.

19. Because the decree did not adjudge that the execution and delivery of the agreement and the giving of the notes mentioned in the amended bill were not within the powers incidental to the carrying on of the business of banking for which said American National Bank was established.

20. Because the decree did not adjudge that said American National Bank did not have power under Sec. 5136 of the Revised

Statutes of the United States to enter into said contract or
552 to execute and deliver said notes.

21. Because the decree did not adjudge that said transaction to-wit: the execution of said agreement and the giving of said notes, was prohibited by the public policy of the United States as shown by the provisions of the Revised Statutes controlling the voluntary liquidation, involuntary liquidation and consolidation of National Banks.

22. Because the decree did not adjudge that said transaction was prohibited by Sections 5145 and 5147 of the U. S. Revised Statutes.

23. Because the decree did not adjudge that said transaction was prohibited by Section 5202 of the U. S. Revised Statutes.

24. Because the decree did not adjudge that the transactions between said American National Bank of Omaha and said Union National Bank of Omaha set forth in the amended bill were not in the usual course of the banking business of said American National Bank, and that, for that reason, these defendants, shareholders of said American National Bank, were, and each of them was, not liable for any deficit that might remain after the application of the assets of said bank to the payment of the three notes set forth in said amended bill.

25. Because the decree did not adjudge that the contract, debts and engagements set forth in said amended bill were not duly contracted or entered into in the ordinary course of the business of said American National Bank of Omaha, and that, by reason thereof, the shareholders of said bank, to-wit:—these defendants and each of them, were not liable to said complainant
nor to said Union National Bank of Omaha, for the
553 following among other reasons, to-wit:

(1) Because the transactions set forth in the amended bill was not a borrowing of money by said American National Bank of said Union National Bank within the meaning of or within the powers conferred by the banking laws of the United States.

(2) Because the said American National Bank sold and assigned its business, its cash on hand, its office furniture, its fixtures, and certain of its bills receivable to said Union National Bank.

(3) Because the agreement set forth in said amended bill provided that said Union National Bank should liquidate the assets of said American National Bank.

(4) Because in said agreement said American National Bank agreed to sustain and pay one-half the loss and expense which said Union National Bank might sustain on account of its removal from its present quarters by reason of its unpaid lease of its present place of business and one-half of the loss which it might sustain on the sale of its office furniture and fixtures.

(5) Because in said agreement said American National Bank guaranteed said Union National Bank against any and all loss on account of assuming its liabilities.

(6) Because in said agreement said American National Bank sold and assigned all of its remaining assets to said Union National Bank.

(7) Because the amount of the three notes mentioned in said amended bill was not determined and said notes were not signed until after said American National Bank had sold and assigned all its assets to said Union National Bank.

554 (8) Because said American National Bank was compelled to and did cease to do business as a bank.

(9) Because said American National Bank surrendered all control over its assets.

(10) Because its directors ceased to exercise any direction or control over its affairs or assets.

(11) Because said American National Bank entrusted to said Union National Bank all its assets to be sold, collected or compromised at the discretion of said Union National Bank.

(12) Because said American National Bank guaranteed that such assets should continue to be sufficient to meet the payment of the three notes set out in said amended bill.

(13) Because said American National Bank executed and delivered the three non-negotiable promissory notes mentioned in said amended bill.

(14) Because said American National Bank agreed to pay interest at 6% per annum on $291,000.00 from and after Dec. 23, 1895.

(15) Because said American National Bank and the defendants, shareholders thereof, still remain liable for any valid indebtedness existing against said American National Bank at the time its assets were turned over to said Union National Bank.

Wherefore, these defendants pray and each of them prays that said decree be reversed and that said court may be directed to enter a decree dismissing said defendants and each of them with his costs.

Dated June 4th, 1903.

555 CHARLES W. MORTON,
JAMES H. MORTON,
GEORGE MORTON and
MARY E. MORTON,
By W. H. DeFrance,
Their Solicitor.

Indorsed: Filed Jun 4 1903. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 4th day of
556 June, 1903 a Petition for Appeal was filed in said case, which said Petition is in words and figures following, to-wit:

In the Circuit Court of the United States in and for the District of Nebraska.

Summer Wallace, Complainant,
Dsc. T. No. 261. vs. In Equity.
American National Bank, a corporation, The McCague Investment Company, a corporation, Thomas H. McCague, Alex. G. Charlton, Elmer C. Brownlee, Elizabeth Dufrene, Executrix of the last Will and Testament of Alfred R. Dufrene, Deceased, Edgar M. Morsman, Philip Mergin, George G. Wallace, William S. Poppleton, John S. King, William Wallace, Charles F. Manderson, Anna C. Crowell, Charles C. George, Robert H. McClellan, Peter Frenzer, John N. Frenzer, Charles H. Walworth, Frank W. Wessels, Frank Graham, James H. McCulloch, John P. Charlton, C. W. Morton, Royal Wilson, Jacob Wead, James J. Brown, Jr., James J. Woodward, Viola Coffin, Howard B. Smith, Edward G. Glenn, Emily J. Robinson, James H. Morton, George Morton, Mary E. Morton, William Wilson, Henry F. Wyman, Albert U. Wyman, F. R. McConnell, Trustee, John Speer, John E. Patrick, R. L. Brownlee, Caroline Carpenter, William C. Beer, Marcus C. Acheson, George Marples, Arthur H. Flack, Meade C. Williams, James H. Conrad, T. R. Neal, J. H. Hawkins, William Baird, The Manufacturers' National Bank of Boston, Mass., a corporation, John L. McCague, Morris Levy, National Bank Building Company of America, a corporation John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, part-

ners doing business under the firm name and style of McCague Bros., Rufus B. Bullock, Thomas L. Kimball, Thomas L. Kimball, Trustee, Alex. G. Charlton, Secretary, Samuel Blackwell, and the Union National Bank of Omaha, Nebraska, Defendants

Petition for Appeal.

557 Now come Charles W. Morton, James H. Morton, George Morton and Mary E. Morton, defendants in the above entitled action and now comes each of said defendants, and conceiving themselves and each conceiving himself aggrieved by the decree made and entered in the above entitled cause on the 23rd day of May, 1903, do, and each of them does, hereby appeal from said decree to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons specified in the Assignment of Errors filed herewith, and pray, and each of them prays, that this appeal may be allowed and that a transcript of the records, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated June 4th, 1903.

CHARLES W. MORTON,
JAMES H. MORTON,
GEORGE MORTON and
MARY E. MORTON,
By W. H. DeFrance,
Their Solicitor.

Indorsed: Filed Jun 4, 1903. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 4th day of
558 June, 1903, an Order Allowing Appeal was filed in said case, which said Order is in words and figures following, to-wit:

In the Circuit Court of the United States in and for the District of Nebraska.

Sumner Wallace, Complainant,
Doc. T. No. 261. vs. In Equity.
American National Bank, a corporation, The McCague Investment Company, a corporation, Thomas H. McCague, Alex. G. Charlton, Elmer C. Brownlee, Elizabeth Dufrene, Executrix of the last Will and Testament of Alfred R. Dufrene, Deceased, Edgar M. Morsman, Philip Mergin, George G. Wallace, William S. Poppleton, John S. King, William Wallace, Charles F. Manderson, Anna C. Crowell, Charles C. George, Robert H. McClellan, Peter

Frenzer, John N. Frenzer, Charles H. Walworth, Frank W. Wessels, Frank Graham, James H. McCulloch, John P. Charlton, C. W. Morton, Royal Wilson, Jacob Wead, James J. Brown, Jr., James J. Woodward, Viola Coffin, Howard B. Smith, Edward G. Glenn, Emily J. Robinson, James H. Morton, George Morton, Mary E. Morton, William Wilson, Henry F. Wyman, Albert U. Wyman, F. R. McConnell, Trustee, John Speer, John E. Patrick, R. L. Brownlee, Caroline Carpenter, William C. Beer, Marcus C. Acheson, George Marples, Arthur H. Flack, Meade C. Williams, James B. Conrad, T. R. Neal, J. H. Hawkins, William Baird, The Manufacturers' National Bank of Boston, Mass., a corporation, John L. McCague, Morris Levy, National Bank Building Company of America, a corporation, John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners doing business under the firm name and style of McCague Bros., Rufus B. Bullock, Thomas L. Kimball, Thomas L. Kimball, Trustee, Alex. G. Charlton, Secretary, Samuel Blackwell, and the Union National Bank of Omaha, Nebraska, Defendants

Order Allowing Appeal.

559 On motion of the solicitor for each of the following named defendants in the above entitled action, to-wit: Charles W. Morton, James H. Morton, George Morton and Mary E. Morton,

It is Ordered in open court that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the final decree heretofore filed and entered herein be, and the same is allowed, and that a certified transcript of the record, testimony, papers, and proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals.

It is Further Ordered that the bond on appeal for each of the defendants above named who may desire to supersede said decree shall be fixed at a sum which shall at least equal the amount adjudged against such defendant and interest thereon for a period of one and one-half years and costs taxed against him and that, upon the approval of such bond, said decree shall be superseded as to such defendants.

It is Further Ordered that the bond on appeal for such of the defendants as do not desire to supersede said decree be fixed at the sum of $200.00, which shall be for costs only and shall, when approved, not operate as a supersedeas bond.

It is further Ordered that any or all of the defendants whose bonds shall be approved, may join in such appeal without prejudice to any special or peculiar rights or defenses they or any of them may have and that one record only be transmitted to said United States Circuit Court of Appeals, which record shall be equally available to each and all of such defendants.

Dated June 4th, 1903.

W. H. MUNGER, Judge.

Indorsed: Filed Jun 4, 1903. Geo. H. Thummel, Clerk.

560 Thereupon afterwards, to-wit:—On the 9th day of June, 1903, a Power of Attorney was filed in said case, which said Power of Attorney is in words and figures following, to-wit:—

Power of Attorney.

Know All Men by These Presents, That I, George Morton of Riverside, Cook County, Illinois, have made, constituted and appointed and by these Presents do make, constitute and appoint Charles W. Morton of Douglas County, Nebraska, my true and lawful Attorney for me and in my name, place and stead, to execute any and all papers or documents including bond, necessary in order to appeal from the decree to be rendered and entered in a certain cause pending in the Circuit Court of the United States for the District of Nebraska wherein Sumner Wallace is Complainant and American National Bank, Charles W. Morton, George Morton and others are Respondents, which said cause is known as Number 261, Docket T, of the records of said Court, giving and granting unto him, my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and conforming all that my said Attorney or his substitute shall lawfully do or cause to be done by virtue thereof.

In Witness Whereof I have hereunto set my hand and seal the 12th day of May, one thousand Nine Hundred and Three.

GEORGE MORTON, [Seal]

Sealed and delivered in presence of
Sidney T. Blane.

561 United States of America,
State of Illinois,
County of Cook—ss.

Be It Known, That on the 12th day of May, one thousand Nine Hundred and Three, before me personally appeared George Morton above named who is to me known to be the person described in and who executed the above Letter of Attorney and acknowledged the same to be his free act and deed.

In Testimony Whereof, I have hereunto subscribed my name and affixed my official seal, the day and year last above written.

HERBERT HAASE,
[Seal] Notary Public.

Indorsed: Filed Jun 9, 1903. Geo. H. Thummel, Clerk.

562 Thereupon afterwards, to-wit: On the 9th day of June, 1903, Bonds in favor of plaintiff and Union National Bank, on behalf of the defendants George, Mary E., James H., and Chas. W. Morton, were filed, which said Bonds are in words and figures following, to-wit:

In the Circuit Court of the United States, in and for the District of Nebraska.

Sumner Wallace, Complainant,
No. 261. vs. Doc. T.
American National Bank, et al, Defendants.

Bond for Appeal.

Know All Men by These Presents,

That we, George Morton, principal, and James Morton of Omaha, Neb., surety, are held and firmly bound unto Sumner Wallace in the full and just sum of $50.00 to be paid to the said Sumner Wallace, his heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 9th day of June in the Year of our Lord, one thousand nine hundred and three.

Whereas, lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska in a suit pending in said Court wherein Sumner Wallace was plaintiff, and said George Morton was one of the defendants, a decree was rendered against the said George Morton and the said George Morton has obtained an order of the said Court allow-

ing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

563 Now, the condition of the above obligation is such, that if the said George Morton shall prosecute said appeal to effect and answer and pay all damages and costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

GEORGE MORTON
By Charles W. Morton, Atty. in Fact. [Seal]
JAMES MORTON [Seal]

Sealed and delivered in
presence of Edward Chapman.

Approved this 9th day of June, 1903.
By W. H. MUNGER, Judge.

Indorsed: Filed Jun 9, 1903. Geo. H. Thummel, Clerk.

564 In the Circuit Court of the United States in and for the District of Nebraska.

Sumner Wallace, Complainant,
Doc. T. No. 261. vs.
American National Bank, et al., Defendants.

Bond for Appeal.

Know All Men By These Presents,

That we, George Morton, principal, and James Morton of Omaha, Neb., surety, are held and firmly bound unto the Union National Bank of Omaha, Nebraska, in the full and just sum of $150.00 to be paid to the said Union National Bank of Omaha, Nebraska, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 9th day of June in the year of our Lord, One Thousand Nine Hundred and Three.

Whereas, lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska, in a suit pending in said court, wherein Sumner Wallace was plaintiff and the said Union National Bank of Omaha was one of the defendants, and the said George Morton was one of the defendants, a decree was rendered against the said George Morton and the said George Morton has obtained an order of the said Court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

Now, the condition of the above obligation is such, that if the said George Morton shall prosecute said appeal to effect and answer and pay all damages and costs if he fails to make good his plea, then the above obligation to be void, else to remain
565 in full force and virtue.

GEORGE MORTON.
By Charles W. Morton, Atty. in Fact. [Seal]
JAMES MORTON. [Seal]

Sealed and delivered in
presence of
Edward Chapman.

Approved this 9th day of June, 1903
By W. H. MUNGER, Judge.

Indorsed: Filed Jun. 9, 1903. Geo. H. Thummel, Clerk.

566 In the Circuit Court of the United States, in and for the District of Nebraska.

Sumner Wallace, Complainant,
Doc. T. No. 261. vs.
American National Bank, et al., Defendants.

Bond for Appeal.

Know All Men By These Presents,

That we, Mary E. Morton, principal, and James Morton of Omaha, Neb., surety, are held and firmly bound unto Sumner Wallace, in the full and just sum of $50.00 to be paid to the said Sumner Wallace, his heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 9th day of June in the year of our Lord One Thousand Nine Hundred and Three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska in a suit pending in said Court, wherein Sumner Wallace was plaintiff, and said Mary E. Morton, was one of the defendants, a decree was rendered against the said Mary E. Morton and the said Mary E. Morton has obtained an order of the said court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

Now, the condition of the above obligation is such that if the said Mary E. Morton shall prosecute said appeal to effect

and answer and pay all damages and costs if [he] fails to make good [his] plea, then the above obligation to be void, else
567 to remain in full force and virtue.

MARY E. MORTON, [Seal]
JAMES MORTON. [Seal]

Sealed and delivered in
presence of
Edward Chapman.

Approved this 9th day of June 1903.
By W. H. MUNGER, Judge.

Indorsed: Filed: Jun. 9, 1903. Geo. H. Thummel, Clerk.

568 In the Circuit Court of the United States, in and for the District of Nebraska.

Sumner Wallace, Complainant,
No. 261. vs. Doc. T.
American National Bank, et al., Defendants.

Bond for Appeal.

Know All Men By These Presents,

That we, Mary E. Morton, principal, and James Morton of Omaha, Neb., surety, are held and firmly bound unto the Union National Bank of Omaha, Nebraska, in the full and just sum of $150.00 to be paid to the said Union National Bank of Omaha, Nebraska, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors jointly and severally by these presents.

Sealed with our seals and dated this 9th day of June in the year of our Lord, One Thousand Nine Hundred and Three.

Whereas, lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska, in a suit pending in said court, wherein Sumner Wallace was plaintiff and the said Union National Bank of Omaha was one of the defendants, and said Mary E. Morton was one of the defendants, a decree was rendered against the said Mary E. Morton and the said Mary E. Morton has obtained an order of the said court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

Now, the condition of the above obligation is such, that if the said Mary E. Morton shall prosecute said appeal to

effect and answer and pay all damages and costs if [he]
569 fails to make good [his] plea, then the above obligation to be void, else to remain in full force and virtue.

MARY E. MORTON, [Seal]
JAMES MORTON, [Seal]

Sealed and delivered in presence of
Edward Chapman.

Approved this 9th day of June, 1903.

By W. H. MUNGER, Judge.

Indorsed: Filed Jun 9, 1903. Geo. H. Thummel, Clerk.

570 In the Circuit Court of the United States, in and for the District of Nebraska.

Sumner Wallace, Complainant,
No. 261. vs. Doc. T.
American National Bank, et al., Defendants.

Bond for Appeal.

Know All Men By These Presents,

That we, James H. Morton principal, and James Morton of Omaha, Neb., surety, are held and firmly bound unto Sumner Wallace, in the full and just sum of $100.00 to be paid to the said Sumner Wallace, his heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 9th day of June in the year of our Lord One Thousand Nine Hundred and Three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska in a suit pending in said Court, wherein Sumner Wallace was plaintiff, and said James H. Morton was one of the defendants, a decree was rendered against the said James H. Morton and the said James H. Morton has obtained an order of the said court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

Now, the condition of the above obligation is such that if the said James H. Morton shall prosecute said appeal to effect and

answer and pay all damages and costs if he fails to make good his plea, then the above obligation to be void, else to
571 remain in full force and virtue.

JAMES H. MORTON, [Seal]
JAMES MORTON, [Seal]

Sealed and delivered in presence of
Edward Chapman.

Approved this 9th day of June, 1903.
By W. H. MUNGER, Judge.

Indorsed: Filed Jun 9, 1903. Geo. H. Thummel, Clerk.

572 In the Circuit Court of the United States, in and for the District of Nebraska.

Sumner Wallace, Complainant,
No. 261. Doc. T. vs.
American National Bank, et al., Defendants.

Bond for Appeal.

Know all men by these presents,

That we, James H. Morton, principal, and James Morton of Omaha, Neb., surety, are held and firmly bound unto the Union National Bank of Omaha, Nebraska, in the full and just sum of $300.00 to be paid to the said Union National Bank of Omaha, Nebraska, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 9th day of June in the year of our Lord, One Thousand Nine Hundred and Three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska, in a suit pending in said court, wherein Sumner Wallace was plaintiff and the said Union National Bank of Omaha was one of the defendants, and said James H. Morton was one of the defendants, a decree was rendered against the said James H. Morton and the said James H. Morton has obtained an order of the said court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

Now, the condition of the above obligation is such, that if the said James H. Morton shall prosecute said appeal to effect and

answer and pay all damages and costs if he fails to make
573 good his plea, then the above obligation to be void, else to remain in full force and virtue.

JAMES H. MORTON, [Seal]
JAMES MORTON. [Seal]

Sealed and delivered in presence
of Edward Chapman.

Approved this 9th day of June, 1903.

By W. H. MUNGER, Judge.

Indorsed: Filed Jun 9, 1903. Geo. H. Thummel, Clerk.

574 In the Circuit Court of the United States, in and for the District of Nebraska.

Sumner Wallace, Complainant,
No. 261. Doc. T. vs.
American National Bank, et al., Defendants.

Bond for Appeal.

Know All Men By These Presents:

That we, Chas. W. Morton, principal and James Morton of Omaha, Neb., surety, are held and firmly bound unto Sumner Wallace in the full and just sum of $300.00 to be paid to the said Sumner Wallace, his heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 9th day of June in the Year of our Lord, One Thousand Nine Hundred and Three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska, in a suit pending in said Court, wherein Sumner Walla e was plaintiff, and said Chas. W. Morton was one of the defendants, a decree was rendered against the said Chas. W. Morton and the said Chas. W. Morton has obtained an order of the said court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

Now, the condition of the above obligation is such, that if the said Chas. W Morton shall prosecute said appeal to effect

and answer and pay all damages and costs if he fails to make good his plea, then the above obligation to be void, else to
575 remain in full force and virtue.

CHARLES W. MORTON, [Seal]
Sealed and delivered in presence of JAMES MORTON. [Seal]
Edward Chapman.

Approved this 9th day of June, 1903.

By W. H. MUNGER, Judge.

576 In the Circuit Court of the United States, in and for the District of Nebraska.

Sumner Wallace, Complainant,
No. 261. vs. Doc. T.
American National Bank, et al., Defendants.

Bond for Appeal.

Know All Men By These Presents:

That we, Chas. W. Morton, principal and James Morton of Omaha, Neb, surety, are held and firmly bound unto the Union National Bank of Omaha, Nebraska in the full and just sum of $1000.00 to be paid to the said Union National Bank of Omaha, Nebraska, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 9th day of June in the Year of our Lord, One Thousand Nine Hundred and Three.

Whereas lately at the May Term of the Circuit Court of the United States in and for the District of Nebraska, in a suit pending in said Court, wherein Sumner Wallace was plaintiff, and said Chas. W. Morton was one of the defendants, a decree was rendered against the said Chas. W. Morton and the said Chas. W. Morton has obtained an order of the said court allowing an appeal to the Circuit Court of Appeals for the Eighth Circuit to reverse the decree in the aforesaid suit.

Now, the condition of the above obligation is such, that if the said Chas. W. Morton shall prosecute said appeal to effect and answer and pay all damages and costs if he fails to make

good his plea, then the above obligation to be void, else
577 to remain in full force and virtue.

CHARLES W. MORTON, [Seal]
JAMES MORTON, [Seal]

Sealed and delivered in presence of
Edward Chapman.

Approved this 9th day of June 1903.

By W. H. MUNGER, Judge.

Indorsed: Filed. Jun. 9, 1903. Geo. H. Thummel, Clerk.

578 Thereupon on said 9th day of June, 1903, Justification of James Morton as Surety for Defendants Morton, was filed in said case, which said Justification is in words and figures following, to-wit:

In the Circuit Court of the United States, in and for the District of Nebraska.

Sumner Wallace, Plaintiff,
Doc. T. vs. No. 261.
American National Bank, et als., Defendants.

State of Nebraska,
Douglas County—ss.

James Morton being duly [sowrn], says that he is a proposed surety for George Morton, Mary E. Morton, Charles W. Morton, and James H. Morton, defendants in the above entitled action, and that he is a resident and freeholder of said County; that he has a freehold Estate in land situate in said County, of the value of $..... over and above all liens and incumbrances thereon; and exclusive of any homestead or other land exempt from execution; and that he is worth in personal property situate in said County, the sum of $20000.00 over and above all his debts, liabilities and responsibilities, and exclusive of personal property exempt from execution, and that he is worth in other real and personal property situate in said State, the sum of $10,000.00 over and above all liens and incumbrances thereon, and beyond all his debts and liabilities, and exclusive of property exempt from execution.

JAMES MORTON.

579 Sworn to before me, and signed in my presence this 9th day of June A. D., 1903.

GEO. H. THUMMEL, Clerk.
By John Nicholson, Deputy.

[Seal U. S. Circuit Court.]

Indorsed: Filed. Jun. 9, 1903. Geo. H. Thummel, Clerk.

580 Thereupon afterwards, to-wit: On the 1st day of July, 1903, Praecipe and Notice was filed in said case, which said Praecipe and Notice is in words and figures following, to-wit:

In the Circuit Court of the United States in and for the District of Nebraska.

Sumner Wallace, Complainant,
Doc. T. 261. vs.
The American National Bank, et al., Defendants.

Praecipe.

To the Clerk of said Court:—

Please make a transcript of the following parts of the record in the above entitled case for appeal to the United States Court of Appeals, to-wit:

1. The bill of complaint filed August 18, 1898.
2. Memorandum of opinion of Judge Munger filed Sept. 29, 1899.
3. Motion to appoint James Burness, trustee, filed Dec. 5, 1899.
4. The order appointing James Burness trustee, entered Jan. 8, 1900.
5. The order granting leave to file amended bill, entered Feb. 7, 1900.
6. The amended bill filed Feb. 17th, 1900 and refiled Jan. 8, 1901.
7. The order granting leave to refile amended bill, etc. entered Jan. 8, 1901.
8. The joint and several answer of Charles W. Morton, James H. Morton, George Morton, and Mary E. Morton, filed June 29, 1901.
9. The answer of the Union National Bank filed Aug. 2, 1901.
10. The replication to the answers of all the defendants, filed Aug. 2, 1901.

581 11. All the evidence and depositions.

12. The journal entry of July 1, 1902, showing case heard on proofs and submitted.
13. Memorandum of opinion of Judge Munger filed Sept. 1, 1902.
14. The order confirming sale by James Burness, trustee, entered Dec. 9, 1902.
15. The order confirming the final report of James Burness, trustee, entered Jan. 3, 1903.

16. The memorandum of opinion of Judge Munger, filed April 24, 1903.
17. The decree entered May 23, 1903.
18. The petition for appeal and the assignment of errors, filed June 4th, 1903, by Charles W. Morton, James H. Morton, George Morton and Mary E. Morton.
19. The order allowing the appeal of Charles W. Morton, James H. Morton, George Morton, and Mary E. Morton, entered June 4th, 1903.
20. The several bonds filed by Charles W. Morton, James H. Morton, George Morton and Mary E. Morton.
21. This praecipe and Notice.

W. H. DeFRANCE,
Solicitor for Charles W. Morton, James H. Morton, George Morton and Mary E. Morton, Defendants.

To Sumner Wallace, complainant and the Union National Bank of Omaha, Defendant:

Please take notice that Charles W. Morton, James H. Morton, George Morton and Mary E. Morton, defendants in the above entitled cause, deem the parts of the record specified in the foregoing praecipe all that is necessary for the hearing of their and each of their appeal in the United States Circuit Court of Appeals for the Eighth Circuit.

W. H. DeFRANCE,
Solicitor for said Defendants.

582 Received a copy of the foregoing praecipe and notice this 13 day of June, 1903.

HALL & McCULLOCH,
J. H. MACOMBER,
Solicitors and Counsel for said Sumner Wallace, and said Union National Bank of Omaha.

Indorsed: Filed Jul 1, 1903. Geo. H. Thummel, Clerk.

583 Thereupon afterwards, to-wit: On the 21st day of May, 1903, Motion to Revive was filed in said case, which said Motion is in words and figures following, to-wit:

In the United States Circuit Court in and for the District of Nebraska.

Sumner Wallace, Complainant,
T. 261. vs.
American National Bank, et al., Respondents.

Motion.

Now comes George W. McClellan as Executor of the Estate of Robert H. McClellan, deceased, and shows to the Court that

the said Robert H. McClellan died on the.....day of August, 1902, and that the said George W. McClellan has been regularly and legally appointed as Executor of the Estate of Robert H. McClellan, deceased, has qualified as such Executor, and is acting as such Executor.

The said George W. McClellan, as Executor of the Estate of Robert H. McClellan, deceased, moves the Court for an order reviving this cause against him as Executor, and asks to be made a party defendant, and that the answer and defense of Robert H. McClellan in this action stand for the answer and defense of the said George W. McClellan as Executor.

May 16, 1903.

CHAS. BATTELLE,
Solicitor for George W. McClellan, as Executor of the Estate of Robert H. McClellan, deceased.

Indorsed: Filed May 21, 1903. Geo. H. Thummel, Clerk.

584 Thereupon afterwards, to-wit: At the May 1903 Term of said Court, and on the 21st day of May, 1903, the following Order of Revivor was signed and filed in said case, and duly entered of record in Journal No. 2 of said Court to-wit:

Sumner Wallace, Complainant,
T. 261. vs.
The American National Bank, et al., Respondents.

Order.

Now on this 16th day of May, 1903, this cause coming on to be heard upon the application of George W. McClellan as Executor of the Estate of Robert H. McClellan, deceased, for an order reviving this cause and to allow him to become a defendant herein and to adopt the answer and defense of the said Robert H. McClellan for himself as Executor, and the complainant appearing by his counsel and consenting thereto, it is hereby

Ordered and Adjudged by the Court that this cause be and the same hereby is revived as to the said George W. McClellan as Executor, and he is hereby made a party defendant in place of and instead of the said Robert H. McClellan, deceased, and the answer and defense of the said Robert H. McClellan, deceased is hereby made the answer and defense of George W. McClellan, as Executor.

By the Court,
W. H. MUNGER, Judge.

Indorsed: Filed May 21, 1903. Geo. H. Thummel, Clerk.

585 Thereupon afterwards, to-wit: On the 22nd day of June, 1903, Assignment of Errors was filed in said case which said Assignment of Errors is in words and figures following, to-wit:

In the United States Circuit Court in and for the District of Nebraska.

Summer Wallace, Complainant,
Doc. "T". No. 261. vs.
The American National Bank, et al., Defendants.

Assignments of Errors.

And now on this 22 day of June, 1903, the McCague Investment Company, Thomas M. McCague, Alex. G. Charlton, Anna C. Crowell, George W. McClellan, Executor of the last will and testament of Robert H. McClellan, deceased, Emily J. Robinson, John Speer, Robert L. Brownlee, Caroline Carpenter, George Marples, J. H. Hawkins, John L. McCague, and John L. McCague, Thomas H. McCague, William L. McCague, and Alex. G. Charlton, partners under firm name and style of McCague Brothers, and Rufus B. Bullock, defendants in the above entitled action, come, and each of them comes, by their solicitor and says, and each of them says, that the decree in said case is erroneous and against the just rights of these said defendants and each of them, for the following reasons, to-wit:

1. The Circuit Court erred in rendering the decree against these defendants, and each of them, because said Court had not jurisdiction of said cause, that is to say: The Complainant, sues as the assignee of a chose in action, to-wit: a non-negotiable promissory note executed by the American National Bank of Omaha as maker and in favor of the Union National Bank of Omaha as payee, each of whom was at the time of the
586 execution and delivery of said note, and at the time of the filing of the original and amended bills a citizen and resident of the State of Nebraska.

2. The Circuit Court erred in rendering decree against these defendants, and against each of these defendants, because said Court had not jurisdiction of said cause, that is to say: The said American National Bank had not gone into voluntary liquidation pursuant to Section 5220 of the Revised Statutes of the United States at any time prior to the rendition of said decree.

3. The Circuit Court erred in rendering decree against these defendants, and against each of these defendants, because said Court had not jurisdiction of the cause, that is to say: The

Complainant had not reduced his claim to judgment against the American National Bank and exhausted his remedy at law.

4. The Circuit Court erred in rendering said decree against these defendants and against each of these defendants, and adjudging these defendants and each of these defendants to pay to the Complainant, Sumner Wallace, the following sums, to-wit:

	McCague Investment Company the sum of.	$465.20
	Thomas H. McCague, the sum of	232.60
	Alex. G. Charlton, the sum of	209.34
	Anna C. Crowell, the sum of	226.77
	George W. McClellan, Executor of last will and testament of Robert H. McClellan, deceased, the sum of	1163.
	Emily J. Robinson, the sum of	34.89
	John Speer, the sum of	232.60
	R. L. Brownlee, the sum of	581.50
	Caroline Carpenter, the sum of	418.68
587	George Marples, the sum of	$348.90
	J. H. Hawkins, the sum of	581.50
	John L. McCague, the sum of	6675.62
	John L. McCague, Thomas H. McCague, William L. McCague, and Alex. G. Charlton, partners doing business under the firm name and style of McCague Brothers, the sum of	1163.00
	Rufus B. Bullock, the sum of	523.35

because the agreement between the American National Bank and the Union National Bank, dated December 21, 1895, a copy of which is attached to the amended bill of complaint as Exhibit "A" and the alleged promissory note set out in the said bill, are ultra vires and void, and created no liability for which shareholders are responsible.

5. The Circuit Court erred in rendering the said decree against these defendants, and against each of these defendants, and in adjudging these defendants, and each of these defendants, to pay to said Complainant, Sumner Wallace, the following sums, to-wit:

McCague Investment Company, the sum of	$ 465.20
Thomas H. McCague, the sum of	232.60
Alex. G. Charlton, the sum of	209.34
Anna C. Crowell, the sum of	226.77
George W. McClellan, Executor of last will and testament of Robert H. McClellan,, deceased, the sum of	1163.00

	Emily J. Robinson, the sum of	34.89
	John Speer, the sum of	232.60
	R. L. Brownlee, the sum of	581.50
	Caroline Carpenter, the sum of	418.68
588	George Marples, the sum of	$348.90
	J. H. Hawkins, the sum of	581.50
	John L. McCague, the sum of	6675.62
	John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners doing business under the firm name and style of McCague Brothers, the sum of	1163.00
	Rufus B. Bullock, the sum of	523.35

Because the obligation of the American National Bank sued on is not an obligation incurred, contracted, or assumed in the course of the business of banking.

6. The Circuit Court erred in rendering said decree against these defendants, and against each of these defendants, and in adjudging these defendants and each of these defendants, to pay to the Union National Bank, the following sums, to-wit:

McCague Investment Company the sum of	$1479.40
Thomas H. McCague, the sum of	739.70
Alex. G. Charlton, the sum of	665.73
Anna C. Crowell, the sum of	721.20
George W. McClellan, Executor of the last will and testament of Robert H. McClellan, deceased, the sum of	3698.50
Emily J. Robinson, the sum of	110.95
John Speer, the sum of	739.70
R. L. Brownlee, the sum of	1849.25
Caroline Carpenter, the sum of	1331.46
George Marples, the sum of	1109.55
J. H. Hawkins, the sum of	21849.25
John L. McCague, the sum of	31229.39
John L. McCague, Thomas H. McCague, William L. McCague, and Alex. G. Charlton, partners doing business under firm name and style of McCague Brothers, the sum of	3698.50
Rufus B. Bullock, the sum of	1664.32

589 because the agreement between the American National Bank and the Union National Bank, dated December 21, 1895, a copy of which is attached to the amended bill of Com-

plaint, and the alleged promissory notes sued on in the answer or claim of the Union National Bank are ultra vires and void, and create no liability for which shareholders are responsible.

7. The Circuit Court erred in rendering said decree and in adjudging these defendants and each of these defendants to pay to the Union National Bank the sums as set forth after each of their names in the above paragraph, or assignment of errors, numbered five (5), because the claim of the said Union National Bank is founded upon an alleged obligation of the American National Bank which was not incurred, assumed, or contracted, in the business of banking.

8. The Circuit Court erred in rendering said decree and in adjudging these defendants, and each of these defendants to pay to the Union National Bank the sums as set forth after each of their names in the above paragraph, or assignment of errors, numbered five (5), because said Court had not jurisdiction of these defendants, or either of these defendants, as to said claim.

9. The Circuit Court erred in not rendering a decree for these defendants, and for each of these defendants.

Wherefore these defendants pray, and each of them prays, that said decree be reversed, and that said Court may be directed to enter a decree dismissing said defendants and each of them, with his costs.

McCAGUE INVESTMENT COMPANY,
THOMAS H. McCAGUE,
ALEX. G. CHARLTON,
590 ANNA C. CROWELL,
GEORGE W. McCLELLAN,
Executor of the last will and testament of Robert H. McClellan, deceased,
EMILY J. ROBINSON,
JOHN SPEER,
R. L. BROWNLEE,
CAROLINE CARPENTER,
GEORGE MARPLES,
J. H. HAWKINS,
JOHN L. McCAGUE, and
JOHN L. McCAGUE,
THOMAS H. McCAGUE,
WILLIAM L. McCAGUE and
ALEX. G. CHARLTON,
Partners doing business under firm name and style of McCague Bros.
and RUFUS B. BULLOCK,
By Chas. Battelle, Their Solicitor.

Indorsed: Filed Jun. 22, 1903. Geo. H. Thummel, Clerk.

591 Thereupon afterwards, to-wit: On the 22nd day of June, 1903, Petition for Appeal was filed in said case, which said Petition for Appeal is in words and figures following, to-wit:

In the United States Circut Court in and for the District of Nebraska.

Sumner Wallace, Complainant,
Doc. "T". vs. No. 261.
The American National Bank, et al., Defendants.

Petition for Appeal.

Comes now the McCague Investment Company, Thomas H. McCague, Alex. G. Charlton, Anna C. Crowell, George W. McClellan, Executor of the last will and testament of Robert H. McClellan, deceased, Emily J. Robinson, John Speer, Robert L. Brownlee, Caroline Carpenter, George Marples, J. H. Hawkins, John L. McCague and John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners under firm name and style of McCague Brothers, and Rufus B. Bullock, defendants, and now comes each of said defendants in the above entitled action, and conceiving themselves, and each conceiving himself or itself aggrieved by the decree entered in the above entitled cause on the 23rd day of May, 1903, do, and each of them does, hereby appeal from said decree to the United States Court of Appeals for the Eighth Circuit for the reasons specified in the assignment of errors filed herewith, and pray, and each of them prays, that this appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said final decree, was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the eighth circuit.

592 And now, at the time of filing this petition, the said defendants and each of said defendants, files an assignment of errors, setting up separately and particularly each error asserted and intended to be urged in the United States

Circuit Court of Appeals for the eighth circuit. And your petitioners, and each of them, will ever pray.

Dated, June 22, 1903.

McCAGUE INVESTMENT COMPANY,
THOMAS H. McCAGUE,
ALEX. G. CHARLTON,
ANNA C. CROWELL,
GEORGE W. McCLELLAN,
Executor of the last will and testament of Robert H. McClellan, deceased,
EMILY J. ROBINSON,
JOHN SPEER,
ROBERT L. BROWNLEE,
CAROLINE CARPENTER,
GEORGE MARPLES,
J. H. HAWKINS,
JOHN L. McCAGUE, and
JOHN L. McCAGUE,
THOMAS H. McCAGUE,
WILLIAM L. McCAGUE and
ALEX. G. CHARLTON,
Partners under firm name and style of McCague Brothers,
and RUFUS B. BULLOCK,
By Chas. Battelle, Their Solicitor.

Indorsed: Filed Jun. 22, 1903. Geo. H. Thummel, Clerk.

593 Thereupon afterwards, to-wit: At the May 1903 Term of said Court and on the 22nd day of June, 1903 the following Order Allowing Appeal was signed and filed in said case, and duly entered of record in Journal No. 2 of said Court, to-wit:

Sumner Wallace, Complainant,
Doc. "T". No. 261. vs.
American National Bank, et al., Defendants.

Order Allowing Appeal.

On motion of the solicitor of each of the following named defendants in the above entitled action, to-wit: McCague Investment Company, Thomas H. McCague, Alex. G. Charlton, Anna C. Crowell, George W. McClellan, Executor of the last will and testament of Robert H. McClellan, deceased, Emily J. Robinson, John Speer, Robert L. Brownlee, Caroline Carpenter, George Marples, J. H. Hawkins, John L. McCague and John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners doing business under firm name and style of McCague Brothers, and Rufus B. Bullock, it is

Ordered, in open Court, that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the final decree heretofore filed and entered herein be, and the same hereby is allowed, and that a certified transcript of the record, testimony, papers and proceedings herein be forthwith transmitted to said United States Court of Appeals. It is further

Ordered that the bonds on appeal for each of the defendants who do not desire to supersede said decree be fixed at the sum of $200.00 which shall be for costs only, but which shall
594 not operate as a supersedeas bond. It is further

Ordered that any or all of the defendants whose bonds shall be approved, may join in such appeal without prejudice to any special or peculiar rights or defenses they or any of them may have, and that one record only be transmitted to said United States Court of Appeals, which shall be equally available to each and all of said defendants.

Dated June 22, 1903.

W. H. MUNGER, Judge.

Indorsed: Filed Jun. 22, 1903. Geo. H. Thummel, Clerk.

595 Thereupon afterwards, to-wit: On the 22nd day of June, 1903, Cost Bond was filed in said case, which said Cost Bond is in words and figures following, to-wit:

Know All Men By These Presents: That we, McCague Investment Company, Thomas H. McCague, Alex. G. Charlton, Anna C. Crowell, George W. McClellan, Executor of the last will and testament of Robert H. McClellan, deceased, Emily J. Robinson, John Speer, R. L. Brownlee, Caroline Carpenter, George Marples, J. H. Hawkins, John L. McCague, and John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners as McCague Brothers, and Rufus B. Bullock, as principals are each held and firmly bound unto Sumner Wallace in the full and just sum of Two Hundred (200) Dollars, and we William J. Hislop and G. S. Benawa, as sureties, are held and firmly bound unto Sumner Wallace in the full and just sum of Two Hundred (200) Dollars for each of said above named principals, to be paid to the said Sumner Wallace, his heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 20 day of June in the year of our Lord one thousand nine hundred and three.

Whereas, lately at the May term, A. D. 1903 of the Circuit Court of the United States for the District of Nebraska, in a suit depending in said Court between Sumner Wallace, Com-

plainant, and American National Bank, et al., and the said McCague Investment Company and the other above named principals to this bond, have obtained an order allowing an appeal from the said Court to the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, to reverse the decree in the aforesaid suit.

596

Now the condition of the above obligation is such, That if the said McCague Investment Company, Thomas H. McCague, Alex. G. Charlton, Anna C. Crowell, George W. McClellan, Executor of the last will and testament of Robert H. McClellan, deceased, Emily J. Robinson, John Speer, R. L. Brownlee, Caroline Carpenter, George Marples, J. H. Hawkins, John L. McCague and John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners as McCague Brothers, and Rufus B. Bullock, shall prosecute said appeal to effect, and answer all costs if they and each of the said defendants named herein as principals, fail to make good their plea, and each of their pleas, then the above obligation to be void, else to remain in full force and virtue.

McCAGUE INVESTMENT COMPANY, [Seal]
THOMAS H. McCAGUE, [Seal]
ALEX. G. CHARLTON, [Seal]
ANNA C. CROWELL, [Seal]
GEORGE W. McCLELLAN, [Seal]
Executor of last will and testament of Robert H. McClellan, deceased.
EMILY J. ROBINSON, [Seal]
JOHN SPEER, [Seal]
Sealed and delivered in presence of Julia S. Fitch, M. A. St. Cyr, as to G. S. Benawa.
R. L. BROWNLEE, [Seal]
CAROLINE CARPENTER, [Seal]
GEORGE MARPLES, [Seal]
J. H. HAWKINS, [Seal]
JOHN L. McCAGUE, and [Seal]
JOHN L. McCAGUE, [Seal]
THOMAS H. McCAGUE, [Seal]
WILLIAM L. McCAGUE, and [Seal]
ALEX. G. CHARLTON, [Seal]
Partners as McCague Bros.,
and RUFUS B. BULLOCK, [Seal]
By Chas. Battelle, [Seal]
Their Solicitor.
WILLIAM J. HISLOP, [Seal]
G. S. BENAWA. [Seal]

Approved by W. H. MUNGER, Judge.

Indorsed: Filed Jun. 22, 1903. Geo. H. Thummel, Clerk.

597 Thereupon afterwards, to-wit: On the 22nd day of June, 1903, Cost Bond was filed in said case, which said Cost Bond is in words and figures following, to-wit:

Know All Men By These Presents: That we, McCague Investment Company, Thomas H. McCague, Alex. G. Charlton, Anna C. Crowell, George W. McClellan, Executor of the last will and testament of Robert H. McClellan, deceased, Emily J. Robinson, John Speer, R. L. Brownlee, Caroline Carpenter, George Marples, J. H. Hawkins, John L. McCague, and John L. McCague, Thomas H. McCague, William L. McCague, and Alex. G. Charlton, partners as McCague Brothers and Rufus B. Bullock, as principals are each held and firmly bound unto the Union National Bank of Omaha in the full and just sum of Two Hundred (200) Dollars, and we, William J. Hislop and G. S. Benawa, as sureties are held and firmly bound unto the Union National Bank of Omaha in the full and just sum of Two Hundred (200) Dollars for each of above named principals, to be paid to the Union National Bank of Omaha, its successors and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 20 day of June in the year of our Lord one thousand nine hundred and three.

Whereas, lately at the May Term A. D. 1903 of the Circuit Court of the United States for the District of Nebraska, in a suit depending in said Court between Sumner Wallace, Complainant, and American National Bank, et al., and the said McCague Investment Company and the other above named principals to this bond, have obtained an order allowing an appeal from the said Court to the United [—] Circuit
598 Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, to reverse the decree in the aforesaid suit.

Now the condition of the above obligation is such, That if the said McCague Investment Company, Thomas H. McCague, Alex. G. Charlton, Anna C. Crowell, George W. McClellan, Executor of the last will and testament of Robert H. McClellan, deceased, Emily J. Robinson, John Speer, R. L. Brownlee, Caroline Carpenter, George Marples, J. H. Hawkins, John L. McCague, and John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners as McCague Brothers, and Rufus B. Bullock shall prosecute said appeal to effect and answer all costs if they and each of the said de-

fendants named herein as principals, fail to make good their plea, and each of their pleas, then the above obligation to be void, else to remain in full force and virtue.

McCAGUE INVESTMENT CO. [Seal]
THOMAS H. McCAGUE [Seal]
ALEX. G. CHARLTON, [Seal]
ANNA C. CROWELL, [Seal]
GEORGE W. McCLELLAN, [Seal]
Executor of the last will and testament of Robert H. McClellan, deceased.

EMILY J. ROBINSON, [Seal]
JOHN SPEER, [Seal]
R. L. BROWNLEE, [Seal]
CAROLINE CARPENTER, [Seal]
GEORGE MARPLES, [Seal]
J. H. HAWKINS, [Seal]
JOHN L. McCAGUE and [Seal]
JOHN L. McCAGUE, [Seal]
THOMAS H. McCAGUE, [Seal]
WILIAM L. McCAGUE, and [Seal]
ALEX. G. CHARLTON, [Seal]
Partners as McCague Brothers,
and RUFUS B. BULLOCK, [Seal]
By Chas. Battelle, [Seal]
Their Solicitor.
WILLIAM J. HISLOP, [Seal]
G. S. BENAWA, [Seal]

Sealed and delivered in presence of Julia S. Fitch, M. A. St. Cyr, as to G. S. Benawa.

Approved by W. H. MUNGER, Judge.

Indorsed: Filed Jun. 22, 1903. Geo. H. Thummel, Clerk.

599 Thereupon afterwards, to-wit: On the 1st day of July, 1903, Praecipe was filed in said case, which said Praecipe is in words and figures following, to-wit:

In the United States Circuit Court for the District of Nebraska.

Sumner Wallace, Complainant,
No. 261. vs. Doc. "T".
American National Bank, et al., Defendants.

Praecipe.

To the Clerk of said Court:

Please make a transcript of the following parts of the record in the above entitled case for an appeal to the United States Court of Appeals, to-wit:

1. The Bill of Complaint filed August 18, 1898.

2. Memorandum of opinion of Judge Munger filed Sept. 29, 1899.

3. Motion to appoint James Burness, Trustee, filed Dec. 5, 1899.

4. Order appointing James Burness, Trustee, entered Jan. 8, 1900.

5. The order granting leave to file amended bill entered Feb. 7, 1900.

6. The amended bill filed Feb. 17, 1900 and refiled Jan. 8, 1901.

7. The order granting leave to refile amended bill, etc., entered Jan. 8, 1901.

8. The joint and several answer of McCague Investment Co., Thos. H. McCague, Alex. G. Charlton, Anna C. Crowell, Robert H. McClellan, Emily J. Robinson, John Speer, R. L. Brownlee, Caroline Carpenter, George Marples, J. H. Hawkins, John L. McCague, and John L. McCague, Thomas H. McCague, William L. McCague, and Alex. G. Charlton, partners doing business under firm name and style of McCague Bros., Rufus B. Bullock, and Alex. G. Charlton, Secretary, filed June 14, 1901.

9. The answer of the Union National Bank filed Aug. 2, 1901.

600 10. The replication to the answer of all the defendants filed Aug. 2, 1901.

11. All the evidence and depositions.

12. The journal entry of July 1, 1902, showing said case heard on proofs and submitted.

13. Memorandum of opinion of Judge Munger filed Sept. 1, 1902.

14. The order confirming sale by James Burness, Trustee, entered Dec. 9, 1902.

15. The order confirming the final report of James Burness, Trustee, entered Jan. 3, 1903.

16. The memorandum of opinion of Judge Munger filed April 24, 1903.

17. The motion of George W. McClellan, Executor of last will and testament of Robert H. McClellan, deceased, asking that the cause be revived in his name, etc., filed May 21, 1903.

18. The journal entry reviving said cause in name of George W. McClellan, as said Executor, etc., filed May 21, 1903.

19. The decree entered May 23, 1903.

20. The petition for appeal and the assignments of error filed June 22nd, 1903, by McCague Invetsment Co., et al.

21. The order allowing the appeal of the McCague Investment Company, and these other defendants who file this praecipe.

22. The several bonds filed by the McCague Investment Company and these other defendants whose names are subscribed to this praecipe.

23. This praecipe and notice.

CHAS. BATTELLE,

Solicitor for McCague Investment Company, Thomas H. McCague, Alex. G. Charlton, Anna C. Crowell, George H. McClellan, Executor of the last will and testament of Robert H. McClellan, deceased, Emily J. Robinson, John Speer, R. L. Brownlee, Caroline Carpenter, George Marples, J. H. Hawkins, John L. McCague and John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners doing business under firm name and style of McCague Bros., Rufus B. Bullock.

601 To Sumner Wallace, Complainant, and to Union National Bank of Omaha, Defendant:

Please take notice that the McCague Investment Company and the other defendants whose names are last above written, defendants in the above entitled cause, deem the parts of the record specified in the foregoing praecipe all that is necessary for their, and each of their appeal in the United States Circuit Court of Appeals for the Eighth Circuit.

CHAS. BATTELLE,
Solicitor for said Defendants.

Received a copy of the foregoing praecipe and notice this 22 day of June, 1903.

J. H. MACOMBER,
HALL & McCULLOCH,
Solicitors and Counsel for said Sumner Wallace and said Union National Bank of Omaha.

Indorsed: Filed Jul. 1, 1903. Geo. H. Thummel, Clerk.

United States of America,
602 District of Nebraska—ss.

I, Geo. H. Thummel, Clerk of the United States Circuit Court for the District of Nebraska, do hereby certify that in compliance with the Precipes of the Solicitors for the defendants taking an appeal herein, found on pages 489, 535, 545, 580 and 599 hereof, the following record has been made, and that the same is a true and faithful Transcript of the pleadings and proceedings of record and on file in said court, as mentioned in said Precipes and as indicated in the foregoing index; and

that the same includes all the evidence offered and received, in the case of "Sumner Wallace, Plaintiff vs. American National Bank, et al.", No. 261 Docket "T".

Seal United States Circuit Court District of Nebraska.

Witness my hand and the seal of said Court at Omaha in said District, this 18th day of July, 1903.

GEO. H. THUMMEL, Clerk.

Filed Jul 20 1903. John D. Jordan, Clerk.

(Appearance for Appellants in Cause No. 1954.)

On the twenty-third day of July, A. D. 1903, the appearance of counsel for appellants was filed in the case of George, *et al.*, *vs.* Wallace, *et al.*, No. 1954, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

CHARLES C. GEORGE ET AL., Appellants,
vs.
SUMNER WALLACE and UNION NATIONAL BANK OF Omaha, Nebraska. } No. 1954.

The clerk will enter my appearance as counsel for the appellants Charles C. George, Henry W. Wyman, Albert U. Wyman and Morris Levy.

HOWARD B. SMITH.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1954. Charles C. George, *et al.*, appellants, *vs.* Sumner Wallace, *et al.* Appearance. Filed Jul- 23, 1903, John D. Jordan, clerk. Howard B. Smith, counsel for appellants, Charles C. George, *et al.*

(Appearance for Appellees in Cause No. 1954.)

And on the nineteenth day of September, A. D. 1903, the appearance of counsel for appellees was filed in the case of George, *et al.*, *vs.* Wallace, *et al.*, No. 1954, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

CHARLES C. GEORGE ET AL., Appellants,
vs.
SUMNER WALLACE and UNION NATIONAL BANK OF Omaha, Nebraska. } No. 1954.

The clerk will enter *my* appearance as counsel for the appellees.

R. S. HALL.
J. H. McCULLOCH.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1954. Charles C. George, *et al.*, appellants, *vs.* Sumner Wallace, *et al.* Appearance. Filed Sep. 19, 1903, John D. Jordan, clerk. R. S. Hall, J. H. McCulloch, counsel for appellees.

(Appearance for Appellants in Cause No. 1955.)

And on the twenty-third day of July, A. D. 1903, the appearance of counsel for appellants was filed in the case of Brownlee, *et al.*, *vs.* Wallace, *et al.*, No. 1955, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

ELMER C. BROWNLEE ET AL., Appellants,
vs.
SUMNER WALLACE and UNION NATIONAL BANK OF Omaha, Nebraska. } No. 1955.

The clerk will enter my appearance as counsel for the appellants, Elmer C. Brownlee, George G. Wallace, Peter Frenzer, John N. Frenzer, and Howard B. Smith.

HOWARD B. SMITH.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1955. Elmer C. Brownlee, *et al.*, appellants, *vs.* Sumner Wallace, *et al.* Appearance. Filed Jul- 23, 1903, John D. Jordan, clerk. Howard B. Smith, counsel for appellants, Elmer C. Brownlee, *et al.*

(Appearance for Appellees in Cause No. 1955.)

And on the nineteenth day of September, A. D. 1903, the appearance of counsel for appellees was filed in the case of Brownlee, *et al.*, *vs.* Wallace, *et al.*, No. 1955, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

ELMER C. BROWNLEE ET AL., Appellants,
vs.
SUMNER WALLACE and UNION NATIONAL BANK OF Omaha, Nebraska. } No. 1955.

The clerk will enter *my* appearance as counsel for the appellees.

R. S. HALL.
J. H. McCULLOCH.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1955. Elmer C. Brownlee, *et al.*, appellants, *vs.* Sumner Wallace, *et al.* Appearance. Filed Sep. 19, 1903, John D. Jordan, clerk. R. S. Hall, J. H. McCulloch, counsel for appellees.

(Appearance for Appellant in Cause No. 1956.)

And on the twenty-third day of July, A. D. 1903, the appearance of counsel for appellant was filed in the case of Morsman *vs.* Wallace, *et al.*, No. 1956, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

EDWARD M. MORSMAN, Appellant,
vs.
SUMNER WALLACE and UNION NATIONAL BANK OF Omaha, Nebraska. } No. 1956.

The clerk will enter my appearance as counsel for the appellant, Edgar M. Morsman.

W. W. MORSMAN.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1956. Edgar M. Morsman, appellant, *vs.* Sumner Wallace, *et al.* Appearance. Filed Jul- 23, 1903, John D. Jordan, clerk. W. W. Morsman, counsel for appellant, Edgar M. Morsman.

(Appearance for Appellees in Cause No. 1956.)

And on the nineteenth day of September, A. D. 1903, the appearance of counsel for appellees was filed in the case of Morsman *vs.* Wallace *et al.*, No. 1956, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

EDGAR M. MORSMAN, Appellant,
vs.
SUMNER WALLACE and UNION NATIONAL BANK OF Omaha, Nebraska. } No. 1956.

The clerk will enter *my* appearance as counsel for the appellees.

R. S. HALL.
J. H. McCULLOCH.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1956. Edgar M. Morsman, appellant, *vs.* Sumner Wallace, *et al.* Appearance. Filed Sep. 19, 1903, John D. Jordan, clerk. R. S. Hall, J. H. McCulloch, counsel for appellees.

(Appearance for Appellant in Cause No. 1957.)

And on the twenty-second day of July, A. D. 1903, the appearance of counsel for appellant was filed in the case of Poppleton *vs.* Wallace, *et al.*, No. 1957, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

WILLIAM S. POPPLETON, Appellant,
vs.
SUMNER WALLACE and UNION NATIONAL BANK OF Omaha, Nebraska. } No. 1957.

The clerk will enter my appearance as counsel for the appellant, William S. Poppleton.

RICHARD S. HORTON.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1957. William S. Poppleton, appellant, *vs.* Sumner Wallace, *et al.* Appearance. Filed Jul- 22, 1903, John D. Jordan, clerk. Richard S. Horton, counsel for appellant, Wm. S. Poppleton.

(Appearance for Appellees in Cause No. 1957.)

And on the nineteenth day of September, A. D. 1903, the appearance of counsel for appellees was filed in the case of Poppleton *vs.* Wallace, *et al.*, No. 1957, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

WILLIAM S. POPPLETON, Appellant,
vs.
SUMNER WALLACE and UNION NATIONAL BANK OF Omaha, Nebraska. } No. 1957.

The clerk will enter *my* appearance as counsel for the appellees.

R. S. HALL.
J. H. McCULLOCH.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1957. William S. Poppleton, appellant, *vs.* Sumner Wallace, *et al.* Appearance. Filed Sep. 19, 1903, John D. Jordan, clerk. R. S. Hall, J. H. McCulloch, counsel for appellees.

(Appearance for Appellants in Cause No. 1959.)

And on the first day of August, A. D. 1903, the appearance of counsel for appellants was filed in the case of McCague Investment Company, *et al.*, *vs.* Wallace, *et al.*, No. 1959, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE McCAGUE INVESTMENT COMPANY ET AL., Appellants,
vs.
SUMNER WALLACE and UNION NATIONAL BANK OF Omaha, Nebraska. } No. 1959.

The clerk will enter my appearance as counsel for the appellants, The McCague Investment Company, Thomas H. McCague, Alex. G. Charlton, Anna C. Crowell, George W. McClellan, executor of the last will and testament of Robert H. McClellan, deceased, Emily J. Robinson, John Speer, Robert L. Brownlee, Caroline Carpenter, George Marples, J. H. Hawkins, John L. McCague; and John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners under firm name and style of McCague Brothers, and Rufus B. Bullock.

CHAS. BATTELLE,
Counsel for Appellants Above Named.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1959. McCague Investment Company, *et al.*, appellants, *vs.* Sumner Wallace, *et al.* Appearance. Filed Aug. 1, 1903, John D. Jordan, clerk. Chas. Battelle, counsel for McCague Inv. Co., *et al.*, appellants.

(Appearance for Appellees in Cause No. 1959.)

And on the nineteenth day of September, A. D. 1903, the appearance of counsel for appellees was filed in the case of McCague Investment Co., *et al.*, *vs.* Wallace, *et al.*, No. 1959, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE McCAGUE INVESTMENT CO. ET AL., Appellants,
vs.
SUMNER WALLACE and UNION NATIONAL BANK OF Omaha, Nebraska. } No. 1959.

The clerk will enter *my* appearance as counsel for the appellees.

R. S. HALL.
J. H. McCULLOCH.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1959. The McCague Investment Co., *et al.*, appellants, *vs.* Sumner Wallace, *et al.* Appearance. Filed Sep. 19, 1903, John D. Jordan, clerk. R. S. Hall, J. H. McCulloch, counsel for appellees.

(Stipulation for Submission of Cause No. 1959.)

And on the seventeenth day of November, A. D. 1903, a stipulation was filed in the case of McCague Investment Co., *et al.*, *vs.* Wallace, *et al.*, No. 1959, to submit the same on briefs in cases Nos. 1954, 1955 and 1956, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE McCAGUE INVESTMENT COMPANY ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees.
} No. 1959.

Stipulation as to Briefs.

It is hereby stipulated and agreed by and between The McCague Investment Company and all the other appellants in this appeal and Sumner Wallace and The Union National Bank, appellees, that the filing of briefs in the above entitled appeal is waived, and that the briefs filed or to be filed in the appeals of Chas. C. George, *et al.*, *vs.* Sumner Wallace, *et al.*, No. 1954, and the appeal of Elmer C. Brownlee, *et al.*, *vs.* Sumner Wallace, *et al.*, No. 1955, and the appeal of Edgar M. Morsman *vs.* Sumner Wallace, *et al.*, number 1956, are to be and stand as and for the briefs of the appellants and appellees in the above entitled action.

CHAS. BATTELLE,
Solicitor for The McCague Investment Company *et al.*, Appellants.
HALL & McCULLOCH,
Solicitor for Sumner Wallace, Appellee.
HALL & McCULLOCH,
Solicitor for The Union National Bank *et al.*, Appellees.

(Endorsed:) No. 1959. In U. S. circuit court of appeals (8th circuit) The McCague Investment Company, *et al.*, appellants, *vs.* Sumner Wallace, *et al.*, appellees. Stipulation to submit on briefs in cases Nos. 1954, 1955 and 1956. Filed Nov. 17, 1903, John D. Jordan, clerk. Chas. Battelle, solicitor for the McCague Inv. Co., *et al.*

(Argument Commenced.)

And on the fourth day of January, A. D. 1904, in the record of the proceedings of said circuit court of appeals is an entry in said causes Nos. 1954, 1955, 1956, 1957 and 1959, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1903.

MONDAY, January 4, 1904.

CHARLES C. GEORGE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL. } No. 1954.

Appeal from the Circuit Court of the United States for the District of Nebraska.

ELMER C. BROWNLEE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL. } No. 1955.

Appeal from the Circuit Court of the United States for the District of Nebraska.

EDGAR M. MORSMAN, Appellant,
vs.
SUMNER WALLACE ET AL. } No. 1956.

Appeal from the Circuit Court of the United States for the District of Nebraska.

WILLIAM S. POPPLETON, Appellant,
vs.
SUMNER WALLACE ET AL. } No. 1957.

Appeal from the Circuit Court of the United States for the District of Nebraska.

* * * * * * *

THE MCCAGUE INVESTMENT COMPANY ET AL., Appellants,
vs.
SUMNER WALLACE ET AL. } No. 1959.

Appeal from the Circuit Court of the United States for the District of Nebraska.

These causes having been called for hearing in their regular order, argument was commenced by Mr. Howard B. Smith in behalf of appellants, Charles C. George, *et al.*, and Elmer C. Brownlee, *et al.*, but the argument not having been concluded at the hour of adjournment, the further hearing of these causes was postponed until tomorrow morning.

(Order of Submission of Causes Nos. 1954, 1955, 1956, and 1957.)

And on the fifth day of January, A. D. 1904, in the record of the proceedings of said circuit court of appeals is an order of submission in said causes Nos. 1954, 1955, 1956 and 1957, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1903.

TUESDAY, January 5, 1904.

CHARLES C. GEORGE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL. } No. 1954.

Appeal from the Circuit Court of the United States for the District of Nebraska.

ELMER C. BROWNLEE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL. } No. 1955.

Appeal from the Circuit Court of the United States for the District of Nebraska.

EDGAR M. MORSMAN, Appellant,
vs.
SUMNER WALLACE ET AL. } No. 1956.

Appeal from the Circuit Court of the United States for the District of Nebraska.

WILLIAM S. POPPLETON, Appellant,
vs.
SUMNER WALLACE ET AL. } No. 1957.

Appeal from the Circuit Court of the United States for the District of Nebraska.

These causes having been called this day for further hearing, argument was continued by Mr. Howard B. Smith, counsel for appellants, Charles C. George, *et al.*, and Elmer C. Brownlee, *et al.*, by Richard S. Horton, counsel for appellant, William S. Poppleton, by Mr. R. S. Hall, for the appellees and concluded by Mr. W. W. Morsman, counsel for appellant, Edgar M. Morsman.

Thereupon these causes were submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed in these cases.

(Order of Submission of Cause No. 1959.)

And on the fifth day of January, A. D. 1904, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause No. 1959, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1903.

TUESDAY, January 5, 1904.

THE McCAGUE INVESTMENT COMPANY ET AL., Appellants, *vs.* SUMNER WALLACE ET AL. } No. 1959.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause having been called this day for further hearing, the same is now submitted to the court, pursuant to the stipulation of the parties, upon the transcript of record from said circuit court and the briefs of counsel filed in the cases of Charles C. George, *et al.*, appellants, *vs.* Sumner Wallace, *et al.*, No. 1954, Elmer C. Brownlee, *et al.*, appellants, *vs.* Sumner Wallace, *et al.*, No. 1955, and Edgar M. Morsman, appellant, *vs.* Sumner Wallace, *et al.*, No. 1956.

(Opinion.)

And on the eighth day of December, A. D. 1904, an opinion of said circuit court of appeals was filed in said causes Nos. 1954, 1955, 1956, 1957, 1958 and 1959, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1904.

CHARLES C. GEORGE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees. } No. 1954.

ELMER C. BROWNLEE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees. } No. 1955.

EDGAR M. MORSMAN, Appellant,
vs.
SUMNER WALLACE ET AL., Appellees. } No. 1956.

WILLIAM S. POPPLETON, Appellant,
vs.
SUMNER WALLACE ET AL., Appellees. } No. 1957.

CHARLES W. MORTON ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees. } No. 1958.

THE MCCAGUE INVESTMENT COMPANY ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees. } No. 1959.

Appeals from the Circuit Court of the United States for the District of Nebraska.

Mr. W. W. Morsman, Mr. Howard B. Smith and Mr. Richard S. Horton for appellants.

Mr. R. S. Hall (Mr. J. H. McCulloch and Mr. James H. Macomber were with him on the brief) for appellees.

Before Sanborn, Thayer, and Hook, Circuit Judges.

These are appeals from a decree of the circuit court of the United States for the district of Nebraska enforcing the liability of the appellants as shareholders of the American National Bank of Omaha. In December, 1895, the managing officers of that bank anticipated the withdrawal, about the first of the following year, of a large amount of deposits. The condition of the bank was such that it had not available funds sufficient to meet the expected demands and to thereafter continue in business and comply with the requirements of the national banking act. Consequently on December 21, 1895, a contract was entered into with the Union national bank of

the same city, the terms of which, so far as need be recited, are as follows: The Union national assumed the payment of the liabilities of the American national to its depositors and on account of bills payable, and in return was to receive its cash, cash items and such bills receivable as the former was willing to accept at par and without recourse. The difference between the aggregate of the amounts so received and the gross amount of liabilities assumed was to be represented by three non-negotiable promissory notes of the American national, the payment of which was to be secured by a pledge of all of its remaining assets to Thomas L. Kimball as trustee. This contract was carried out. The Union national moved into and took possession of the quarters of the retiring bank. It was ascertained that the total indebtedness of the American national on account of deposits, demand and time certificates and bills payable, which were assumed by the Union national, amounted to $289,097.30; that the cash, cash items and bills receivable taken without recourse by the Union national aggregated $88,097.30; that a balance of $201,000 remained. To evidence this balance the president and cashier of the American national executed to the Union national three non-negotiable promissory notes, each for $67,000, payable respectively in one, two, and three years from their date, December 23, 1895. In accordance with the contract the remaining assets of the American national were placed in the hands of Thomas L. Kimball, the president of the American national, as trustee for the contracting parties and for the protection of their respective rights under the contract. Kimball as trustee retained possession and controlled the collection of them until his death, which occurred during the pendency of the complainant's suit, when his successor, James Burness, was appointed and thereafter continued in the performance of the trust duties. The assets which were pledged to the Union national, although of large amount in face value, were found to be of little actual worth. The execution of the contract of December 21, 1895, by the president and cashier of the American national, was directed by resolution of the board of directors of that bank. On January 14, 1896, an annual meeting of the shareholders of that bank was held, at which were represented sixteen hundred and sixty-five and three-fourths shares out of a total of two thousand. At this meeting a resolution was adopted instructing the directors to take action looking to the liquidation of the bank. On February 25, 1896, another meeting of the shareholders was held, at which were represented sixteen hundred and ninety-six shares and at which a resolution for the voluntary liquidation of the bank was adopted by an affirmative vote of sixteen hundred and thirty-nine and three fourths shares. Thomas L. Kimball, theretofore appointed as trustee of the remaining assets of the bank, by the contract of December 21, 1895, was designated in the resolution as the agent and trustee of the shareholders in the liquidation proceedings. All of the subsequent proceedings provided by law for voluntary liquidation were thereupon duly adopted. The Union national ful-

filled its obligations under the contract, having taken up the liabilities assumed by it. It being found that the trustee was meeting with little success in the collection of the assets and that the principal of the note first maturing had been but slightly reduced, this suit was instituted August 8, 1898, by Sumner Wallace, a citizen of New Hampshire, as the assignee of the note, against the Union national, Thomas L. Kimball, trustee, and the American national and its stockholders, including the appellants. By an amended bill the complainant sought, on behalf of himself and all of the other creditors of the American national, the winding up of the affairs of that bank, the determination of the amount due him upon his note, the subjection of the remaining assets to the payment of his claim, the ascertainment of all of the creditors and the amounts of their claims, and the enforcement of the liability of the stockholders. The complainant had not reduced his note to judgment prior to the institution of the suit. During the progress of the suit the uncollected assets were sold by order of the court and the proceeds accounted for. Upon final hearing a decree was entered ascertaining the amounts due the complainant and the Union national after the application of all credits, the number of shares of stock held by each shareholder of the American national and against each defendant shareholder for $97.23 per share of stock held by him. The amount of the recovery was appropriately apportioned between the two creditors. From this decree the appeals were prosecuted.

HOOK, circuit judge, after stating the case as above, delivered the opinion of the court.

The complainant, a citizen of New Hampshire, sued as the assignee of a non-negotiable promissory note. His assignor, the payee of the note, is a national bank located in the State of Nebraska, and is therefore to be deemed a citizen of that State so far as concerns the question of jurisdiction. Most of the appellants are also citizens of Nebraska. This being so, some ground of Federal jurisdiction other than diversity of citizenship must be found to exist to justify the maintenance of the suit against them. May it be found in the provisions of the acts of Congress relating to cases for the winding up of the affairs of the national banking associations and to enforce the liability of shareholders of such associations as may have gone into voluntary liquidation? It is obvious that any case of such a character would be one arising under the laws of the United States of which, in the absence of some specific limitation of the general grant of jurisdiction, a circuit court would have cognizance irrespective of the citizenship of the parties.

The statutes which are pertinent to this question are as follows:

"Any (national banking) association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock." (Sec. 5220 Rev. Stat.; U. S. Comp. Stat. 1901, p. 3503.)

"That when any national banking association shall have gone

into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established." (Act of June 30, 1876, c. 156, sec. 2, 19 Stat. 63; U. S. Comp. Stat. 1901, p. 3509.)

"That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed." (Proviso to sec. 4, act of July 12, 1882, c. 290, 22 Stat. 163; U. S. Comp. Stat. 1901, p. 3458.)

"That all national banking associations established under the laws of the United States shall, for the purpose of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district court shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." (Act of Aug. 13, 1888, c. 866, sec. 4, 25 Stat. 436; U. S. Comp. Stat. 1901, p. 514.)

Section 2 of the act of June 30, 1876, was not repealed either by the act of July 12, 1882, or by the judiciary act of August 13, 1888. The former authorizes suits against shareholders for the enforcement of their statutory liability, while the two latter relate exclusively to suits by or against the banking associations themselves. These subject matters, while closely related, are in a legal sense quite different. But even if the later acts could be said to cover in a general way the purpose of the first, nevertheless under well known rules of statutory construction, the law prescribing the special remedy in a particular case would stand unrepealed. That it is still in force and operative has been judicially recognized. Commercial Nat. Bank v. Weinhard, 192 U. S. 243, 250; Donald v. Thompson, 184 U. S. 71, 75; King v. Pomeroy, 121 Fed. 287, 58 C. C. A. 209; Williamson v. Bank, 115 Fed. 793, 52 C. C. A. 1.

Prior to the act of July 12, 1882, relating to national banking associations, the circuit courts of the United States had general cognizance of suits by or against national banks, but by the proviso of section 4 of that act such banks were placed for purposes of jurisdiction in the category of domestic corporations of the States in which they were respectively located, with an exception as to "suits between them and the United States or its officers and agents." This proviso was excerpted from the act of 1882 and embodied, with some change of phraseology, in section 4 of the judiciary act of March 3, 1887, and of the corrective act of August 13, 1888, the exception being expressed as follows: "The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof or cases for winding up the affairs of any such bank." Cases of the latter character were not in terms excepted from the prohibition of the act of 1882. It seem clear that section 4 of the act of 1888 was intended to displace and to be a substitute for the proviso of section 4 of the earlier act,

It was not the purpose of Congress, by either of these acts, to wholly deprive the circuit courts of jurisdiction of suits by or against national banks arising from the subject matter thereof. A suit which may be brought in a circuit court by or against a citizen of a State because it arises under the Constitution, laws or treaties of the United States, may for the same reason be brought in such court by or against a national bank located in the same State. (Petri *v.* National Bank, 142 U. S. 644, 647). All that was intended was that jurisdiction should no longer be asserted solely on the ground of the Federal origin of such banks—merely because of the source of their incorporation. In respect of jurisdiction they are to be considered as though they were organized under the laws of the States in which they are respectively located.

So far, therefore, as the case at bar may be considered as one to enforce the liability of the stockholders of a national bank which has gone into voluntary liquidation the jurisdiction of the circuit court is sustained by section 2 of the act of June 30, 1876.

But a broader and more satisfactory ground may be found in the provisions of the act of August 13, 1888. Section 1 of that act in general terms confers jurisdiction of causes arising under the laws of the United States, while those which are brought to wind up the affairs of national banks are expressly excepted from the prohibitions of section 4.

A suit against an insolvent national bank which has gone into voluntary liquidation to enforce a specific lien, or to enforce and judicially administer a trust previously created by contract, or to enforce and judicially administer the trust arising from the insolvency and proceedings in liquidation, is a suit arising under the laws of the United States. It is also a suit to wind up the affairs of such bank. The same is true of a suit to enforce the liability of the stockholders of such a bank. In Guarantee Co. *v.* Hanway, 104

Fed. 369, 44 C. C. A. 312, it was held by this court that an action to recover a judgment against an agent selected by the stockholders of a national bank to succeed a receiver appointed by the Comptroller of the Currency, and to enforce the same against the assets of the bank, is in effect a case to wind up its affairs under section 4 of the act of 1888. This case was followed in International Trust Co. *v.* Weeks, 116 Fed. 898, a suit to recover on a covenant in a lease from an agent appointed by the stockholders of a national bank to close its affairs. On appeal the jurisdiction of the court was upheld by virtue of section 4 of the act of 1888. Weeks *v.* Trust Co., 125 Fed. 379, — C. C. A. —. See, also, Snohomish County *v.* National Bank, 81 Fed. 518, which was a suit to enjoin the stockholders' agent, engaged in winding up the affairs of the bank, from proceeding further, and to procure the appointment of a receiver to take charge of the remaining assets.

The tangible assets of an insolvent national bank which is in the process of liquidation constitute, in the hands of the liquidating agent, a trust fund for the primary benefit of creditors, and so of the liability of the shareholders of a bank similarly circumstanced.

In King *v.* Pomeroy, *supra*, it was said that the enforcement of the liability of the stockholders of a national bank in process of liquidation and the distribution of the proceeds "is as much a part of the liquidation of the debts of the bank as the collection and distribution of the proceeds of its bills receivable or any other of its assets." There is no sound reason why, at the suit of one or more creditors on behalf of all, for the winding up of the affairs of the bank, there may not be had, if so desired, a complete judicial administration of the affairs of the bank, an ascertainment of the valid and subsisting claims against it, an enforcement of the trusts in respect of both the assets and the capital stock, and finally the distribution of the avails. Nor would a bill for such comprehensive relief be multifarious (Richmond *v.* Irons, 121 U. S. 27). All of these results are accomplished in an involuntary proceeding in liquidation under the direction of the Comptroller of the Currency which is said to constitute but one continuous transaction; and as was observed by the Supreme Court, "When in the case of voluntary liquidation the proceeding is instituted by one or more creditors for the benefit of all, by means of the jurisdiction of a court of equity, there seems to be no reason why the nature of the proceeding should be considered as changed. * * * The two subjects of applying the assets of the bank and enforcing the liability of the stockholders, however otherwise distinct, are by the statute made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank." (Richmond *v.* Irons, *supra*.)

It was not essential to the maintenance of the suit in the court below that the complainant should have first reduced his demand to judgment. The debtor bank was insolvent and had gone into voluntary liquidation. The complainant, a contract creditor, asserted a lien

by way of pledge upon all of the undisposed assets of the bank and sought the establishment of his claim. All of such assets had been placed in the hands of a defendant who, by express contract, was constituted a trustee for the primary benefit of the Union National which became a creditor by the assumption and payment of the demands of all of the other creditors of the bank; and the complainant, as an assignee of the Union National, sought the enforcement of the trust thereby created. The defendant who was trustee under the contract was also the liquidating agent or trustee by virtue of his selection and appointment by the stockholders acting in the liquidation proceedings

A suit for the enforcement of a lien or for the enforcement and administration of a trust is one peculiarly of equitable cognizance and may be maintained by a contract creditor whose demand has not been reduced to judgment. Day *v.* Washburn, 24 How. 352; Case *v.* Beauregard, 101 U. S. 688; Townsend *v.* Vanderwerker, 160 U. S. 171, 178; Clews *v.* Jamieson, 182 U. S. 461, 478. In Oelrich *v.* Spain, 82 U. S. 211, the court said that whenever an element of trust existed, jurisdiction in equity was always conferred. In these respects the case at bar differs from those cited by the appellants. Jones *v.* Green, 68 U. S. 330; Smith *v.* R. Co., 99 U. S. 398; Scott *v.* Neely, 140 U. S. 106; Nat. Tube Works Co. *v.* Ballou, 146 U. S. 517; Hollins *v.* Brierfield Co., 150 U. S. 371. In the first three of these cases the absence of a lien was especially noticed and in the last, the absence of both a lien and an enforcible trust. It is no doubt true that the mere insolvency of a corporation will not in itself justify the maintenance of a suit in equity by a simple contract creditor and that the trust which is frequently spoken of as arising from that condition is not an express trust which attaches to the property of the insolvent for the direct benefit of the creditor, but is merely one *sub modo* which is recognized in the judicial administration of the affairs of the insolvent corporation. But when insolvency is accompanied, as in this case, by a conveyance of assets to a trustee and a pledge thereof for the benefit of creditors, and this is followed by affirmative proceedings in liquidation especially authorized by law and the selection by the shareholders of the same trustee as their liquidating agent, an express trust does attach to the assets of the insolvent corporation for the direct benefit of the creditors. Such a lien may be enforced and such a trust may be judicially administered at the suit of a simple contract creditor; and a court having lawfully acquired jurisdiction may, to give complete relief, proceed with the enforcement of the liability of the shareholders. Richmond *v.* Irons, *supra;* King *v.* Pomeroy, *supra.* In this connection it may be observed that, while in section 1 of the act of 1876 it is expressly provided that a creditor who is entitled to call upon the Comptroller of the Currency to institute involuntary proceedings against a national bank must have reduced his demand to judgment, by section 2 "any creditor" may file a bill against the shareholders of a bank in voluntary liquidation.

It is contended that in making the contract, executing the notes and transferring its assets the American National transcended its corporate powers and that no debt was thereby created which could be enforced against its shareholders. Ward *v.* Joslin, 186 U. S. 142. We may at the outset omit any consideration of what might be the case were these transactions dependent alone upon the authority of the officers and board of directors of the bank, for the evidence shows clearly that what was done by them was ratified and confirmed by the shareholders. The contract of December 21, 1895, was executed by Thomas L. Kimball as president of the American National pursuant to the instruction of a resolution of its board of directors. At the annual meeting of the shareholders held January 14, 1896, at which sixteen hundred and sixty-five out of a total of two thousand shares of stock were represented, the contract was read and an explanation made by the president of the condition of the bank which led up to and made its execution necessary. This was followed at the same meeting by the adoption of a resolution, by the votes of those representing more than sixteen hundred shares of stock, instructing the directors to take action looking to the liquidation of the bank. Pursuant to this resolution another meeting of the shareholders was held February 25, 1896, sixteen hundred and ninety-six shares being represented, at which a formal resolution for liquidation in accordance with sections 5220 and 5221 of the Revised Statutes was adopted by a vote of those owning sixteen hundred and thirty-nine and three-fourths shares, being some three hundred more than were necessary under the law. In this resolution it was provided that "Thos. L. Kimball be and he is hereby appointed the agent and trustee of the shareholders of such bank to effect such liquidation." The significance of this appointment is apparent when it is recalled that Kimball was also designated as the agent or liquidating trustee in the contract of December 21, 1895. Another shareholders' meeting was held Jan'y 12, 1897, at which fifteen hundred and thirty-one shares were represented, and at this meeting there was presented a comparative statement over the signature of Thomas L. Kimball, trustee, showing the condition of the bank on December 21, 1895, when the contract was made, and on January 1, 1897. It included an account of transactions during the progress of the liquidation, and an expression of views as to the best course to be pursued with reference to the remaining assets. Reference was definitely and explicitly made in this statement to the Union national and to the payment to it of proceeds of collections which had been made by the trustee. It was ordered to be spread upon the records of the bank. Shortly after the execution of the contract of December 21, 1895, and before the adoption of the resolution for liquidation, a writing containing an express ratification of the action of the directors in respect of the contract between the two banks was executed by the owners of more than two-thirds of the stock of the American national. At no meeting of the shareholders, so far as

the record shows, was there any word of criticism or objection to the transaction with the Union national except so far as it may be gathered from the mere fact that a small number of shares were voted against the resolution for liquidation. When it is considered that the Union national was engaged in carrying out its part of the contract, was disbursing its funds in taking up and caring for the contracts, debts and engagements of the American national, the duty of the shareholders of the latter in meeting assembled to then repudiate the transaction if they ever desired to do so was imperative. Instead of so doing they supplemented the transaction with the Union national by proceedings in voluntary liquidation adopted by a vote largely in excess of that required by law and conducted such liquidation in connection with and as part of the performance of the contract of December 21, 1895. Every consideration of equity, good conscience and justice leads to the conclusion that the shareholders should be held to have ratified and approved of what was done and what was then being done.

So far as the Union national was concerned the transaction between the two banks was in the exercise of its ordinary powers as a banking association. Schofield *v.* Bank, 97 Fed. 282, 38 C. C. A. 179. When the contract was entered into the American national was confronted by an emergency. A withdrawal from the bank of a large amount of deposits was anticipated and it had not the money or available cash resources to meet it and thereafter continue business. At the time, as subsequent experience demonstrated, the bank was in fact hopelessly insolvent. But in the light of the conditions which were known it was within the power of the officers and directors of that bank to make the contract of December 21, 1895, with the approval of the shareholders owning a larger proportion of the capital stock than was necessary under the law in case of a voluntary liquidation.

The expression "usual course of business" as one of limitation upon the powers of a corporation is generally referable to the activities of a going concern and has little, if any, application to one which is upon the threshold of liquidation because of insolvency. In the latter condition the managing officers of a corporation, with the approval of the shareholders, may make any fair and equitable disposition of its assets which, not being in violation of any provision of law, will insure the payment of all of its debts and is reasonably calculated to preserve the largest equity for its shareholders. In such an emergency a corporation should not be held to be helpless and incapable of an act of duty to creditors and of preservation of the interests of its shareholders merely because it may be outside of the usual routine or course of its business.

In the case at bar all of the obligations of the American national to the Government were fully performed, no duty was omitted which called for the interposition of the Comptroller of the Currency and no Federal statute was violated. Upon insolvency and the institution of proceedings in liquidation the assets of a national bank stand

pledged by law to the payment of the debts, and the surplus, if any, to a ratable distribution among the shareholders. The contract which is attacked by the appellants was intended to accomplish nothing substantially different. Instead of many creditors to be dealt with it was arranged that there should be one whose demands should embrace those of all of the others. And in considering the relation of the Union national and the complainant, its assignee, to the American national, we need not stop at the three notes which they hold. In the same sense that a shareholder may go behind a judgment recovered against his corporation to show the character of the indebtedness which it represents, so in a case like the one in hand may a creditor, holding a note of the bank, show if necessary the nature of the debt which is evidenced thereby. In equity the claims of the complainant and the Union national represent the "contracts, debts and engagements" of the American national for which the stockholders of the latter are responsible in accordance with the provisions of section 5151 of the Revised Statutes.

The complaint made on behalf of some of the appellants on account of the computation of interest upon the claims of the creditors was not made the subject of an assignment of error and is therefore not considered.

The decree of the circuit court is affirmed.

Filed December 8, 1904.

(Decree in Cause No. 1954.)

And on the eighth day of December, A. D. 1904, in the record of the proceedings of said circuit court of appeals is a decree in the case of George, *et al.*, *vs.* Wallace, *et al.*, No. 1954, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1904.

THURSDAY, December 8, 1904.

CHARLES C. GEORGE, HENRY F. WYMAN, ALBERT U. Wyman, and Morris Levy, Appellants,
vs.
SUMNER WALLACE and UNION NATIONAL BANK OF Omaha, Nebraska. } No. 1954.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause, be, and the same is hereby, affirmed with costs; and that Sumner Wallace and the Union National Bank of Omaha, Nebraska, have and recover against Charles C. George, Henry F. Wyman, Albert U. Wyman and Morris Levy the sum of twenty dollars for their costs herein and have execution therefor.

December 8, 1904.

(Petition of Henry F. Wyman *et al.* for Appeal in Cause No. 1954.)

And on the sixth day of February, A. D. 1905, the petition of Henry F. Wyman, *et al.*, for appeal was filed in the case of George, *et al.*, *vs.* Wallace, *et al.*, No. 1954, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

CHARLES C. GEORGE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees.
} No. 1954. In Equity.

Petition for Allowance of Appeal.

To the honorable the judges of the circuit court of appeals:

Now come Henry F. Wyman and Morris Levy, appellants in the above entitled action and represent, and now comes each of said appellants and represents:

1. That heretofore, to-wit: on the 8th day of December, A. D. 1904, the circuit court of appeals aforesaid rendered a final decree in the above entitled cause, affirming the decree of the circuit court of the United States for the district of Nebraska, rendered on the 16th day of May, 1903, by which decree of the circuit court said appellant Henry F. Wyman was adjudged and decreed to pay to the appellee Sumner Wallace, the sum of $1354.89, and also to pay to the appellee, The Union National Bank, the sum of $4308.75, and said appellant Morris Levy was adjudged and decreed to pay to the appellee Sumner Wallace, the sum of $1163.00, and also to pay to the appellee The Union National Bank the sum of $3698.50; and that by said decree of said circuit court each of said appellants was adjudged and decreed to pay to said Sumner Wallace and to said Union National Bank respectively, interest at the rate of six per cent. per annum upon the several amounts adjudged to be due them from May 1, 1903.

2. That said suit was originally instituted in the said circuit court and the jurisdiction of said circuit court was invoked by the appel-

lee, Sumner Wallace as plaintiff in said suit on the ground of diverse citizenship, and also on the ground that the case was one arising under the laws of the United States and the jurisdiction of the circuit court was sustained by the circuit court of appeals on the ground that the suit was one arising under the laws of the United States.

3. That the decree of the circuit court on the merits was not one which the Supreme Court of the United States might have reviewed by direct appeal from, or writ of error to, the circuit court, nor is the case one in which, by the judiciary act of 1891, the decree of the circuit court of appeals is made final, but the appellant is by the said act entitled to an appeal by right to the Supreme Court of the United States.

4. That appellants aver, and each of them avers, that the decree of the United States circuit court of appeals affirming the decree of the circuit court aforesaid, is erroneous and prejudicial and conceiving themselves aggrieved by said decree do, and each of them does, hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment and specification of errors filed herewith, and pray, and each of them prays, that this appeal may be allowed and that a transcript of the record, proceedings and all papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated Jan'y 26th, 1905.

HENRY F. WYMAN,
MORRIS LEVY,
By HOWARD B. SMITH,
Their Solicitor.

(Endorsed:) No. 1954. In the United States circuit court of appeals, eighth circuit. Charles C. George, *et al.*, *vs.* Sumner Wallace, *et al.* Petition for allowance of appeal by Henry F. Wyman & Morris Levy. Filed Feb. 6, 1905, John D. Jordan, clerk. Howard B. Smith, sol'r for appellants.

(Assignment of Errors by Henry F. Wyman *et al.* in Cause No. 1954.)

And on the sixth day of February, A. D. 1905, an assignment of errors by Henry F. Wyman, *et al.*, was filed in the case of George, *et al.*, *vs.* Wallace, *et al.*, No. 1954, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

CHARLES C. GEORGE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees.
No. 1954.

Assignment and Specification of Errors.

Now come Henry F. Wyman and Morris Levy, appellants in the above entitled action, and say, and each of them says, that the decree in said cause is erroneous and against the just rights of these appellants and each of them for the following reasons, to-wit:

1. That the circuit court of appeals erred in its decree in holding it was not essential to the maintenance of the suit in the court below (to-wit: in said circuit court for the district of Nebraska) that the complainant (Sumner Wallace) should have first reduced his demand to judgment.

2. That the circuit court of appeals erred in its decree affirming the decree and judgment of the circuit court for the district of Nebraska; that is to say, in holding that the suit is one to wind up the affairs of a national bank and a suit arising under the laws of the United States of which the circuit court had jurisdiction.

3. That the circuit court of appeals erred in its interpretation of the contract of December 21, 1895, between the American national bank and the Union national bank, and in holding the same to be merely a contract by which "the Union national bank assumed the payment of the liabilities of the American national to its depositors and on account of bills payable, and in return was to receive its cash, cash items and such bills receivable as the former was willing to accept at par and without recourse. The difference between the aggregate of the amounts so received and the gross amount of liabilities assumed was to be represented by three non-negotiable promissory notes of the American national, the payment of which was to be secured by a pledge of all of its remaining assets to Thomas L. Kimball as trustee," which erroneous interpretation was material to the final conclusion of the court.

4. That the circuit court of appeals erred in holding that the contract of December 21, 1895, between the American national bank and the Union national bank, had been ratified by the shareholders of the American national bank, and that the individual liability of shareholders under section 5151 of the Revised Statutes of the United States might, therefore be enforced.

5. That the circuit court of appeals erred in holding that the complainant, Sumner Wallace and Union national bank could go behind the contract of December 21, 1895, and that their claims were, in equity, for the "contracts, debts and engagements," of the American national bank, for which shareholders are made individually liable, under section 5151 of the Revised Statutes.

6. That the circuit court of appeals erred in holding that the computation of interest upon the claims of the creditors, upon which was based the decree of said circuit court, was not made the subject of an assignment of error and erred in refusing to consider the complaint of the appellants in that behalf.

Wherefore, these appellants pray, and each of them prays, that said decree be reversed and that they, and each of them, may have such other and further relief as they may be entitled to receive.

HENRY F. WYMAN,
MORRIS LEVY,
By HOWARD B. SMITH,
Their Solicitor.

(Endorsed:) No. 1954. In the United States circuit court of appeals eighth circuit. Charles C. George, *et al. vs.* Sumner Wallace, *et al.* Assignment and specification of errors by Henry F. Wyman and Morris Levy. Filed Feb. 6, 1905. John D. Jordan, clerk. Howard B. Smith, sol'r for appellants.

(Appeal Bond of Henry F. Wyman to Sumner Wallace *et al.* in Cause No. 1954.)

And on the sixth day of February, A. D. 1905, the appeal bond of Henry F. Wyman to Sumner Wallace, *et al.*, was filed in the case of George, *et al.*, *vs.* Wallace, *et al.*, No. 1954, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

CHARLES C. GEORGE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees.
} No. 1954. Appeal Bond.

Know all men by these presents, that we, Henry F. Wyman, of the county of Douglas and State of Nebraska, as principal, and Randall K. Brown, of the county of Douglas and State of Nebraska, as surety, are jointly and severally held and firmly bound unto Sumner Wallace, his heirs, executors, administrators and assigns and unto the Union National Bank of Omaha, Nebraska, its successors and assigns, in the penal sum of three hundred dollars ($300.00) lawful money of the United States well and truly to be paid;

The condition of the foregoing obligation is such that;

Whereas, the above bounden Henry F. Wyman has appealed from the decree and judgment of the United States circuit court of appeals for the eighth judicial circuit in a certain cause therein pending, wherein the said Henry F. Wyman is appellant and Sumner Wallace and The Union National Bank are appellees, and

wherein the United States circuit court of appeals has affirmed a judgment against said Henry F. Wyman in favor of said Sumner Wallace and a judgment in favor of the said Union National Bank.

Now, therefore, if the said Henry F. Wyman, appellant in said cause, shall prosecute his said appeal to effect and answer and pay all costs if he fail to make good his plea, then this obligation to be null and void, but otherwise to remain in full force and virtue.

Witness our hands this 30th day of January, 1905.

HENRY F. WYMAN.
RANDALL K. BROWN.

In presence of
ADAM KUNDERT.

Approved this sixth day of February, 1905.

WALTER H. SANBORN,
Presiding Judge of the U. S. Circuit Court
of Appeals for the Eighth Circuit.

(Endorsed:) No. 1954. In the United States circuit court of appeals, eighth circuit. Charles C. George, *et al.*, appellants, *vs.* Sumner Wallace, *et al.* Appeal bond Henry F. Wyman to Sumner Wallace and Union National Bank. Filed Feb. 6, 1905, John D. Jordan, clerk.

(Justification of Surety on Appeal Bond of Henry F. Wyman to Sumner Wallace *et al.* in Cause No. 1954.)

And on the sixth day of February, A. D. 1905, the justification of surety on the appeal bond of Henry F. Wyman to Sumner Wallace, *et al.*, was filed in the case of George, *et al.*, *vs.* Wallace, *et al.*, No. 1954, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

CHARLES C. GEORGE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees. } No. 1954.

Justification of Surety.

STATE OF NEBRASKA, }
County of Douglas, } ss:

Randall K. Brown, being first duly sworn, deposes and says that he is a proposed surety for Henry F. Wyman in the above entitled action; that he is a resident and freeholder of the county of Douglas in the State of Nebraska; that he has a freehold estate in lands

situate in said county of Douglas, State of Nebraska, of the value of $1000.00 over and above all liens and encumbrances thereon and exclusive of any homestead or other land exempt from execution; and that he is worth in personal property situate in said county the sum of $1000.00 over and above all his debts, liabilities and responsibilities, and exclusive of personal property exempt from execution; and that he is worth in other real and personal property situate in said State the sum of $1000.00 over and above all liens and encumbrances thereon and beyond all his debts and liabilities and exclusive of property exempt from execution.

RANDALL K. BROWN.

Subscribed in my presence and sworn to before me this 30th day of January, A. D. 1905.

[SEAL.] ADAM KUNDERT,
Notary Public.

My commission expires Mar. 13, 1909.

(Endorsed:) No. 1954. In the United States circuit court of appeals, eighth circuit. Charles C. George, *et al.*, appellants, vs. Sumner Wallace, *et al.* Justification of surety for Henry F. Wyman on bond to Sumner Wallace and Union National Bank. Filed Feb. 6, 1905, John D. Jordan, clerk.

(Supersedeas Bond of Morris Levy to Sumner Wallace in Cause No. 1954.)

And on the sixth day of February, A. D. 1905, a supersedeas bond of Morris Levy to Sumner Wallace was filed in the case of George, *et al.*, *vs.* Wallace, *et al.*, No. 1954, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

CHARLES C. GEORGE ET AL., Appellants, *vs.* SUMNER WALLACE ET AL., Appellees.	No. 1954. Supersedeas Bond.

Know all men by these presents, that we, Morris Levy, of the county of Douglas and State of Nebraska, as principal, and Herman Cohn, of the county of Douglas and State of Nebraska, as surety, are jointly and severally held and firmly bound unto Sumner Wallace of Omaha, Nebraska, his heirs, executors, administrators and assigns, in the penal sum of thirty-five hundred dollars ($3500.00) lawful money of the United States well and truly to be paid:

The condition of the foregoing obligation is such that:

Whereas, the above bounden Morris Levy has appealed from the decree and judgment of the United States circuit court of appeals for the eighth judicial circuit in a certain cause therein pending, wherein the said Morris Levy is appellant and Sumner Wallace and The Union National Bank are appellees, and wherein the United States circuit court of appeals has affirmed a judgment rendered against said Morris Levy in said cause for the sum of $1163.00 in favor of the said Sumner Wallace,

Now, therefore, if the said Morris Levy, appellant in said cause, shall prosecute his said appeal to effect and answer and pay all damages and costs if he fail to make good his plea, then this obligation to be null and void, but otherwise to remain in full force and virtue.

Witness our hands this 30th day of January, A. D. 1905.

MORRIS LEVY.
HERMAN COHN.

Approved this sixth day of February, 1905.

WALTER H. SANBORN,
Presiding Judge of the U. S. Circuit Court of
Appeals for the Eighth Circuit.

(Endorsed:) No. 1954. In the United States circuit court of appeals for the eighth circuit. Charles C. George, *et al.*, appellants, vs. Sumner Wallace, *et al.* Supersedeas bond Morris Levy to Sumner Wallace. Filed Feb. 6, 1905, John D. Jordan, clerk.

(Supersedeas Bond of Morris Levy to Union National Bank in Cause No. 1954.)

And on the sixth day of February, A. D. 1905, a supersedeas bond of Morris Levy to Union National Bank was filed in the case of George, *et al.*, *vs.* Wallace, *et al.*, No. 1954, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

CHARLES C. GEORGE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees.
} No. 1954. Supersedeas Bond.

Know all men by these presents, that we, Morris Levy, of the county of Douglas and State of Nebraska, as principal, and Herman Cohn, of the county of Douglas and State of Nebraska, as surety, are jointly and severally held and firmly bound unto the Union National Bank of Omaha, Nebraska, its successors and assigns, in the penal sum of nine thousand dollars ($9000.00) lawful money of the United States well and truly to be paid;

The condition of the foregoing obligation is such that:

Whereas, the above bounden Morris Levy has appealed from the decree and judgment of the United States circuit court of appeals for the eighth judicial circuit in a certain cause therein pending, wherein the said Morris Levy is appellant and Sumner Wallace and The Union National Bank are appellees, and wherein the United States circuit court of appeals has affirmed a judgment rendered against said Morris Levy in said cause for the sum of $3698.50 in favor of the said Union National Bank,

Now, therefore, if the said Morris Levy, appellant in said cause, shall prosecute his appeal to effect and answer and pay all damages and costs if he fail to make good his plea, then this obligation to be null and void, but otherwise to remain in full force and virtue.

Witness our hands this 30th day of January, A. D. 1905.

MORRIS LEVY,
HERMAN COHN.

Approved this sixth day of February, 1905.

WALTER H. SANBORN,
Presiding Judge of the U. S. Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) No. 1954. In the United States circuit court of appeals for the eighth circuit. Charles C. George, *et al.*, appellants, *vs.* Sumner Wallace, *et al.* Supersedeas bond. Morris Levy to Union National Bank. Filed Feb. 6, 1905. John D. Jordan, clerk.

(Order Allowing Appeal of Henry F. Wyman and Morris Levy in Cause No. 1954.)

And on the sixth day of February, A. D. 1905, in the record of the proceedings of said circuit court of appeals is an order allowing appeal of Henry F. Wyman and Morris Levy in the case of George, *et al. vs.* Wallace *et al.*, No. 1954, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1904.

MONDAY, February 6, 1905.

CHARLES C. GEORGE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL. } No. 1954.

Appeal from the Circuit Court of the United States for the District of Nebraska.

Upon consideration of the petition of Henry F. Wyman and Morris Levy for the allowance of an appeal herein, it is now here or-

dered by this court, that an appeal to the Supreme Court of the United States, be, and the same is hereby, allowed to the said Henry F. Wyman and Morris Levy, and each of them, from the decree of this court, entered on the 8th day of December, A. D. 1904; and that the bonds filed by said appellants respectively to Sumner Wallace and the Union National Bank of Omaha, Nebraska, be, and the same are each hereby, approved.

February 6, 1905.

(Citation on Appeal in Cause No. 1954.)

And on the thirteenth day of February, A. D. 1905, the citation on appeal of Henry F. Wyman and Morris Levy was filed in the case of George, *et al. vs.* Wallace, *et al.*, No. 1954, the original of which, with the marshal's return endorsed thereon, is hereto attached and herewith returned.

THE UNITED STATES OF AMERICA:

To Sumner Wallace and the Union National Bank of Omaha, Nebraska, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the U. S. circuit court of appeals for the eighth circuit wherein Henry F. Wyman and Morris Levy, are appellants, and you are appellees, to show cause if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, presiding judge of the U. S. circuit court of appeals for the eighth circuit this sixth day of February in the year of our Lord one thousand nine hundred and five.

WALTER H. SANBORN,
Presiding Judge of the U. S. Circuit Court of
Appeals for the Eighth Circuit.

[Endorsed:] Howard B. Smith. # 2257 No. — United States Supreme Court, Henry F. Wyman and Morris Levy, appellants *vs.* Sumner Wallace, *et al.* Citation on appeal. Filed Feb. 13 1905 John D. Jordan, clerk. Rec'd at marshal's office 2/9 1905 Handed deputy 2/9 1905

Marshal's Costs.

Service	$ .50
Mileage	
Expense	
Total	$ .50

Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA, District of Nebraska, } ss:

I hereby certify and return that I served the annexed citation on the therein named R. S. Hall, att'y for appellees by handing to and leaving a true and correct copy thereof with him personally at Omaha in said district on the 9 day of February, A. D. 1905.

T. L. MATHEWS,
U. S. Marshal,
By H. A. HOMAN, Deputy.

(Decree in Cause No. 1955.)

And on the eighth day of December, A. D. 1904, in the record of the proceedings of said circuit court of appeals is a decree in the case of Brownlee, *et al.*, *vs.* Wallace, *et al.*, No. 1955, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1904.

THURSDAY, December 8, 1904.

ELMER C. BROWNLEE, PETER FRENZER, JOHN N. FRENZER, Howard B. Smith, and George G. Wallace, Appellants,
vs.
SUMNER WALLACE and UNION NATIONAL BANK OF Omaha, Nebraska. } No. 1955.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause, be, and the same is hereby, affirmed with costs; and that Sumner Wallace and the Union National Bank of Omaha, Nebraska, have and recover against Elmer C. Brownlee, Peter Frenzer, John N. Frenzer, Howard B. Smith and George G. Wallace the sum of twenty dollars for their costs herein and have execution therefor.

December 8, 1904.

(Petition for Allowance of Appeal by Peter Frenzer *et al.* in Cause No. 1955.)

And on the sixth day of February, A. D. 1905, a petition for allowance of an appeal was filed in the case of Brownlee, *et al.*, *vs.* Wallace, *et al.*, No. 1955, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

ELMER C. BROWNLEE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees.
} No. 1955. In Equity.

Petition for Allowance of Appeal.

To the honorable the judges of the circuit court of appeals:

Now come Peter Frenzer, Howard B. Smith and George G. Wallace, appellants in the above entitled action and represent, and now comes each of said appellants and represents:

1. That heretofore, to wit: on the 8th day of December, A. D. 1904, the circuit court of appeals aforesaid rendered a final decree in the above entitled cause, affirming the decree of the circuit court of the United States for the district of Nebraska, rendered on the 16th day of May, 1903, by which decree of the circuit court said appellant Peter Frenzer was adjudged and decreed to pay to the appellee Sumner Wallace, the sum of $348.90 and also to pay to the appellee, The Union National Bank, the sum of $1109.55, and said appellant Howard B. Smith was adjudged and decreed to pay to the appellee Sumner Wallace, the sum of $1163.00, and also to pay to the appellee The Union National Bank the sum of $3698.50; and said appellant George G. Wallace was adjudged and decreed to pay to the appellee Sumner Wallace the sum of $1744.50, and also to pay the appellee The Union National Bank the sum of $5547.75; and that by said decree of said circuit court each of said appellants was adjudged and decreed to pay to said Sumner Wallace and to said Union national bank respectively, interest at the rate of six per cent. per annum upon the several amounts adjudged to be due them from May 1, 1903.

2. That said suit was originally instituted in the said circuit court and the jurisdiction of said circuit court was invoked by the appellee Sumner Wallace as plaintiff in said suit on the ground of diverse citizenship, and also on the ground that the case was one arising under the laws of the United States and the jurisdiction of the circuit court was sustained by the circuit court of appeals on the ground that the suit was one arising under the laws of the United States.

3. That the decree of the circuit court on the merits was not one which the Supreme Court of the United States might have reviewed by direct appeal from, or writ of error to, the circuit court, nor is the case one in which, by the judiciary act of 1891, the decree of the circuit court of appeals is made final, but the appellant is by the said act entitled to an appeal by right to the Supreme Court of the United States.

4. That appellants aver, and each of them avers, that the decree of the United States circuit court of appeals affirming the decree of the circuit court aforesaid, is erroneous and prejudicial and conceiving themselves aggrieved by said decree do, and each of them does, hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment and specification of errors filed herewith, and pray, and each of them prays, that this appeal may be allowed and that a transcript of the record, proceedings and all papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

PETER FRENZER,
HOWARD B. SMITH,
GEORGE G. WALLACE,
By HOWARD B. SMITH,
Their Solicitor.

Dated Jan'y 26th, 1905.

(Endorsed :) No. 1955. In the United States circuit court of appeals, eighth circuit. Elmer C. Brownlee, *et al.*, appellants, *vs.* Sumner Wallace, *et al.* Petition for allowance of appeal by Peter Frenzer, *et al.* Filed Feb. 6, 1905, John D. Jordan, clerk. Howard B. Smith, sol'r for appellants.

(Assignment of Errors by Peter Frenzer *et al.* in Cause No. 1955.)

And on the sixth day of February, A. D. 1905, an assignment of errors was filed in the case of Brownlee, *et al.*, *vs.* Wallace, *et al.*, No. 1955, in the words and figures following, to-wit :—

In the United States Circuit Court of Appeals, Eighth Circuit.

ELMER C. BROWNLEE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees.
} No. 1955.

Assignment and Specification of Errors.

Now come Peter Frenzer, Howard B. Smith, and George G. Wallace, appellants in the above entitled action, and say, and each of them says, that the decree in said cause is erroneous and against the

just rights of these appellants and each of them for the following reasons, to-wit:

1. That the circuit court of appeals erred in its decree in holding it was not essential to the maintenance of the suit in the court below (to-wit: in said circuit court for the district of Nebraska) that the complainant (Sumner Wallace) should have first reduced his demand to judgment.

2. That the circuit court of appeals erred in its decree affirming the decree and judgment of the circuit court for the district of Nebraska; that is to say, in holding that the suit is one to wind up the affairs of a national bank and a suit arising under the laws of the United States of which the circuit court had jurisdiction.

3. That the circuit court of appeals erred in its interpretation of the contract of December 21, 1895, between the American national bank and the Union national bank, and in holding the same to be merely a contract for which "The Union national bank assumed the payment of the liabilities of the American national to its depositors and on account of bills payable, and in return was to receive its cash, cash items and such bills receivable as the former was willing to accept at par and without recourse. The difference between the aggregate of the amounts so received and the gross amount of liabilities assumed was to be represented by three non-negotiable promissory notes of the American national, the payment of which was to be secured by a pledge of all of its remaining assets to Thomas L. Kimball as trustee," which erroneous interpretation was material to the final conclusion of the court.

4. That the circuit court of appeals erred in holding that the contract of December 21, 1895, between the American national bank and the Union national bank, had been ratified by the shareholders of the American national bank, and that the individual liability of shareholders under section 5151 of the Revised Statutes of the United States might, therefore be enforced.

5. That the circuit court of appeals erred in holding that the complainant, Sumner Wallace and Union national bank could go behind the contract of December 21, 1895, and that their claims were, in equity, for the "contracts, debts and engagements" of the American national bank, for which shareholders are made individually liable, under section 5151 of the Revised Statutes.

6. That the circuit court of appeals erred in holding that the computation of interest upon the claims of the creditors, upon which was based the decree of said circuit court, was not made the subject of an assignment of error and erred in refusing to consider the complaint of the appellants in that behalf.

Wherefore, these appellants pray, and each of them prays, that said decree be reversed and that they, and each of them, may have such other and further relief as they may be entitled to receive.

PETER FRENZER,
HOWARD B. SMITH,
GEORGE G. WALLACE,
By HOWARD B. SMITH,
Their Solicitor.

(Endorsed:) No. 1955. In the United States circuit court of appeals eighth circuit. Elmer C. Brownlee, *et al.*, appellants, *vs.* Sumner Wallace, *et al.* Assignment and specification of errors by Peter Frenzer, *et al.* Filed Feb. 6, 1905, John D. Jordan, clerk. Howard B. Smith, sol'r for appellants.

(Supersedeas Bond of Peter Frenzer to Sumner Wallace in Cause No. 1955.)

And on the sixth day of February, A. D. 1905, a supersedeas bond of Peter Frenzer to Sumner Wallace was filed in the case of Brownlee, *et al.*, *vs.* Wallace, *et al.*, No. 1955, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

ELMER *E.* BROWNLEE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees.
} No. 1955. Supersedeas Bond.

Know all men by these presents, that we, Peter Frenzer, of the county of Douglas and State of Nebraska, as principal, and Joseph P. Frenzer of the county of Douglas and State of Nebraska, as surety, are jointly and severally held and firmly bound unto Sumner Wallace, his heirs, executors, administrators and assigns, in the penal sum of one thousand dollars ($1000.00) lawful money of the United States well and truly to be paid:

The condition of the foregoing obligation is such that:

Whereas, the above bounden Peter Frenzer has appealed from the decree and judgment of the United States circuit court of appeals for the eighth judicial circuit in a certain cause therein pending, wherein the said Peter Frenzer is appellant and Sumner Wallace and The Union National Bank are appellees, and wherein the United States circuit court of appeals has affirmed a judgment rendered against said Peter Frenzer in said cause for the sum of $348.90 in favor of the said Sumner Wallace.

Now, therefore, if the said Peter Frenzer, appellant in said cause, shall prosecute his said appeal to effect and answer and pay all damages and costs if he fail to make good his plea, then this obligation to be null and void, but otherwise to remain in full force and virtue.

Witness our hands this 31st day of January, A. D. 1905.

PETER FRENZER.
JOS. P. FRENZER.

In presence of
JOHN N. FRENZER.

Approved this sixth day of February, 1905.

WALTER H. SANBORN, Judge.

(Endorsed:) No. 1955. In the United States circuit court of appeals for the eighth circuit. Elmer *E.* Brownlee, *et al.*, appellants, *vs.* Sumner Wallace, *et al.* Supersedeas bond. Peter Frenzer to Sumner Wallace. Filed Feb. 6, 1905, John D. Jordan, clerk.

(Supersedeas Bond of Peter Frenzer to Union National Bank in Cause No. 1955.)

And on the sixth day of February, A. D. 1905, a supersedeas bond of Peter Frenzer to the Union national bank was filed in the case of Brownlee, *et al. vs.* Wallace, *et al.*, No. 1955, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

ELMER C. BROWNLEE ET AL., Appellants, *vs.* SUMNER WALLACE ET AL., Appellees. } No. 1955. Supersedeas Bond.

Know all men by these presents, that we, Peter Frenzer, of the county of Douglas and State of Nebraska, as principal, and Joseph P. Frenzer of the county of Douglas and State of Nebraska, as surety, are jointly and severally held and firmly bound unto The Union National Bank of Omaha, Nebraska, its successors and assigns, in the penal sum of three thousand dollars ($3000.00) lawful money of the United States well and truly to be paid;

The condition of the foregoing obligation is such that:

Whereas, the above bounded Peter Frenzer has appealed from the decree and judgment of the United States circuit court of appeals for the eighth judicial circuit in a certain cause therein pending, wherein the said Peter Frenzer is appellant and Sumner Wallace and The Union National Bank are appellees, and wherein the United States circuit court of appeals has affirmed a judgment rendered against said Peter Frenzer in said cause for the sum of $1109.55 in favor of the said Union national bank.

Now, therefore, if the said Peter Frenzer appel-ant in said cause, shall prosecute his said appeal to effect and answer and pay all damages and costs if he fail to make good his plea, then this obligation to be null and void, but otherwise to remain in full force and virtue.

Witness our hands this 31st day of January, A. D. 1905.

PETER FRENZER.
JOS. P. FRENZER.

In presence of
JOHN N. FRENZER.

Approved this sixth day of February, 1905.

WALTER H. SANBORN, Judge.

(Endorsed:) No. 1955. In the United States circuit court of appeals for the eighth circuit. Elmer C. Brownlee, *et al.*, appellants, *vs.* Sumner Wallace, *et al.* Supersedeas bond. Peter Frenzer to Union national bank. Filed Feb. 6, 1905, John D. Jordan, clerk.

(Justification of Surety on Bonds of Peter Frenzer to Sumner Wallace and Union National Bank in Cause No. 1955.)

And on the sixth day of February, A. D. 1905, the justification of surety on the bonds of Peter Frenzer to Sumner Wallace and Union national bank was filed in the case of Brownlee, *et al.*, *vs.* Wallace, *et al.*, No. 1955, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

ELMER C. BROWNLEE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees. } No. 1955.

Justification of Surety.

STATE OF NEBRASKA,
County of Douglas, } *ss.*:

Joseph P. Frenzer, being first duly sworn, deposes and says that he is a proposed surety for Peter Frenzer in the above entitled action; that he is a resident and freeholder of the county of Douglas in the State of Nebraska; that he has a freehold estate in lands situate in said county of Douglas, State of Nebraska, of the value of $400.00 over and above all liens and encumbrances thereon and exclusive of any homestead or other land exempt from execution; and that he is worth in personal property situate in said county the sum of $20000.00 over and above all his debts, liabilities and responsibilities, and exclusive of personal property exempt from execution; and that he is worth in other real and personal property situate in said State the sum $— over and above all liens and encumbrances thereon and beyond all his debts and liabilities and exclusive of property exempt from execution.

JOS. P. FRENZER.

Subscribed in my presence and sworn to before me this 31st day of January, A. D. 1905.

[SEAL.] FRANK FRAZIER,
Notary Public.

My commission expires Nov. 23, 1909.

(Endorsed:) No. 1955. In the United States circuit court of appeals, eighth circuit. Elmer C. Brownlee, *et al.*, *vs.* Sumner Wallace, *et al.* Justification of surety for Peter Frenzer on bonds to Sumner Wallace and Union National Bank, etc. Filed Feb. 6, 1905, John D. Jordan, clerk.

(Appeal Bond of George G. Wallace to Sumner Wallace and Union National Bank in Cause No. 1955.)

And on the sixth day of February, A. D. 1905, the appeal bond of George G. Wallace to Sumner Wallace and Union National Bank was filed in the case of Brownlee, *et al.*, *vs.* Wallace, *et al.*, No. 1955, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

ELMER C. BROWNLEE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees.
} No. 1955. Appeal Bond.

Know all men by these presents, that we, George G. Wallace, of the county of Douglas and State of Nebraska, as principal, and E. R. Hume of the county of Douglas and State of Nebraska, as surety, are jointly and severally held and firmly bound unto Sumner Wallace, his heirs, executors, administrators and assigns, and unto the Union National Bank of Omaha, Nebraska, its successors and assigns, in the penal sum of three hundred dollars ($300.00) lawful money of the United States well and truly to be paid;

The condition of the foregoing obligation is such that;

Whereas, the above bounden George G. Wallace has appealed from the decree and judgment of the United States circuit court of appeals for the eighth judicial circuit in a certain cause therein pending, wherein the said George G. Wallace is appellant and Sumner Wallace and The Union National Bank are appellees, and wherein the United States circuit court of appeals has affirmed a judgment against said George G. Wallace in favor of said Sumner Wallace and a judgment in favor of the said Union National Bank.

Now, therefore, if the said George G. Wallace, appellant in said cause, shall prosecute his said appeal to effect and answer and pay all costs if he fail to make good his plea, then this obligation to be null and void, but otherwise to remain in full force and virtue.

Witness our hands this 31st day of January, 1905.

GEORGE G. WALLACE.
E. R. HUME.

In presence of
DEXTER L. THOMAS.

Approved this sixth day of February, 1905.
WALTER H. SANBORN, Judge.

(Endorsed:) No. 1955. In the United States circuit court of appeals, eighth circuit. Elmer C. Brownlee, *et al.*, appellants, *vs.* Sumner Wallace, *et al.* Appeal bond. George G. Wallace to Sumner Wallace and Union National Bank, etc. Filed Feb. 6, 1905, John D. Jordan, clerk.

(Justification of Surety on Bond of George G. Wallace to Sumner Wallace *et al.* in Cause No. 1955.)

And on the sixth day of February, A. D. 1905, a justification of surety on the bond of George G. Wallace to Sumner Wallace, *et al.*, was filed in the case of Brownlee, *et al.*, *vs.* Wallace, *et al.*, No. 1955, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

ELMER C. BROWNLEE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees. } No. 1955.

Justification of Surety.

STATE OF NEBRASKA, }
County of Douglas, } *ss:*

E. R. Hume, being first duly sworn, deposes and says that he is a proposed surety for George G. Wallace in the above entitled action; that he is a resident and freeholder of the county of Douglas in the State of Nebraska; that he has a freehold estate in lands situate in said county of Douglas, State of Nebraska, of the value of $2000.00 over and above all liens and encumbrances thereon and exclusive of any homestead or other land exempt from execution; and that he is worth in personal property situate in said county the sum of $— over and above all his debts, liabilities and responsibilities, and exclusive of personal property exempt from execution; and that he is worth in other real and personal property situate in said State the sum of $— over and above all liens and encumbrances thereon and beyond all his debts and liabilities and exclusive of property exempt from execution.

E. R. HUME.

Subscribed in my presence and sworn to before me this 31st day of January, A. D. 1905.

[SEAL.] DEXTER L. THOMAS,
Notary Public.

My commission expires July 27th, 1906.

(Endorsed:) No. 1955. In the United States circuit court of appeals, eighth circuit. Elmer C. Brownlee, *et al.*, appellants, *vs.* vs. Sumner Wallace, *et al.* Justification of surety for George G. Wallace on bond to Sumner Wallace and Union National Bank. Filed Feb. 6, 1905, John D. Jordan, clerk.

(Appeal Bond of Howard B. Smith in Cause No. 1955.)

And on the sixth day of February, A. D. 1905, an appeal bond of Howard B. Smith to Sumner Wallace, *et al.*, was filed in the case of Brownlee, *et al.*, *vs.* Wallace, *et al.*, No. 1955, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

ELMER C. BROWNLEE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL., Appellees.
} No. 1955. Appeal Bond.

Know all men by these presents, that we, Howard B. Smith, of the county of Douglas and State of Nebraska, as principal, and the Fidelity & Deposit Company of Maryland, as surety, are jointly and severally held and firmly bound unto Sumner Wallace, his heirs, executors, administrators and assigns, and unto the Union National Bank of Omaha, Nebraska, its successors and assigns, in the penal sum of three hundred dollars ($300.00) lawful money of the United States well and truly to be paid.

The condition of the foregoing obligation is such that;

Whereas, the above bounden Howard B. Smith, has appealed from the decree and judgment of the United States circuit court of appeals for the eighth judicial circuit in a certain cause therein pending, wherein the said Howard B. Smith is appellant and Sumner Wallace and The Union National Bank are appellees, and wherein the United States circuit court of appeals has affirmed a judgment against said Howard B. Smith in favor of said Sumner Wallace and a judgment in favor of the said Union National Bank,

Now, therefore, if the said Howard B. Smith, appellant in said cause, shall prosecute his said appeal to effect and answer and pay all costs if he fail to make good his plea, then this obligation to be null and void, but otherwise to remain in full force and virtue.

Witness our hands this 2nd day of February, 1905.

HOWARD B. SMITH.
FIDELITY AND DEPOSIT COMPANY
[SEAL.] OF MARYLAND,
By JOHN L. KENNEDY, Attorney in Fact.

In presence of—
V. E. REDFIELD.

Attest:
HARRY S. BYRNE,
Special Agent.

Approved this sixth day of February, 1905.
WALTER H. SANBORN, Judge.

(Endorsed:) No. 1955. U. S. circuit court of appeals, eighth circuit. Elmer C. Brownlee *et al.*, appellants, *vs.* Sumner Wallace *et al.*, appellees. Appeal bond Howard B. Smith to Sumner Wallace and Union National Bank, etc. Filed Feb. 6, 1905. John D. Jordan, clerk.

(Order Allowing Appeal in Cause No. 1955.)

And on the sixth day of February, A. D. 1905, in the record of the proceedings of said circuit court of appeals is an order allowing an appeal to Peter Frenzer, *et al.*, in the case of Brownlee, *et al.*, *vs.* Wallace, *et al.*, No. 1955, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1904.

MONDAY, February 6, 1905.

ELMER C. BROWNLEE ET AL., Appellants,
vs.
SUMNER WALLACE ET AL. } No. 1955.

Appeal from the Circuit Court of the United States for the District of Nebraska.

Upon consideration of the petition of Peter Frenzer, Howard B. Smith and George G. Wallace, for the allowance of an appeal herein, it is now here ordered by this court, that an appeal to the Supreme Court of the United States be, and the same is hereby, allowed to the said Peter Frenzer, Howard B. Smith and George G. Wallace, and each of them, from the decree of this court, entered on the 8th day of December, A. D. 1904; and that the bonds filed by said appellants respectively to Sumner Wallace and the Union National Bank of Omaha, Nebraska, be, and the same are each hereby, approved.

February 6, 1905.

(Citation on Appeal in Cause No. 1955.)

And on the thirteenth day of February, A. D. 1905, a citation on the appeal of Peter Frenzer, *et al.*, was filed in the case of Brownlee, *et al.*, *vs.* Wallace, *et al.*, No. 1955, the original of which, with the marshal's return of service endorsed thereon, is hereto attached and herewith returned.

THE UNITED STATES OF AMERICA:

To Sumner Wallace and the Union National Bank of Omaha, Nebraska, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington,

D. C., thirty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the U. S. circuit court of appeals for the eighth circuit wherein Peter Frenzer, Howard B. Smith and George G. Wallace are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, presiding judge of the U. S. circuit court of appeals for the eighth circuit this sixth day of February in the year of our Lord one thousand nine hundred and five.

WALTER H. SANBORN,
Presiding Judge of the U. S. Circuit Court of
Appeals for the Eighth Circuit.

[Endorsed:] Howard B. Smith # 2258 No. — United States Supreme Court. Peter Frenzer, Howard B. Smith and George G. Wallace, appellants *vs.* Sumner Wallace, *et al.* Citation on appeal. Filed Feb. 13 1905 John D. Jordan clerk Rec'd at marshal's office 2/9 1905 Handed deputy 2/9 1905 Serve on R. S. Hall

Marshal's Costs.

Service	$ 50
Mileage	
Expense	
Total	$ 50

Form No. 282

Return on Service of Writ.

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I hereby certify and return that I served the annexed citation on the therein-named R. S. Hall att'y for appellees by handing to and leaving a true and correct copy thereof with him personally at Omaha in said district on the 9 day of February, A. D. 1905.

T. L. MATHEWS,
U. S. Marshal,
By H. A. HOMAN, Deputy.

(Decree in Cause No. 1956.)

And on the eighth day of December, A. D. 1904, in the record of the proceedings of said circuit court of appeals is a decree in the case of Morsman *vs.* Wallace, *et al.*, No. 1956, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1904.

THURSDAY, December 8, 1904.

EDGAR M. MORSMAN, Appellant,
vs.
SUMNER WALLACE and UNION NATIONAL BANK OF Omaha, Nebraska. } No. 1956.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause, be, and the same is hereby, affirmed with costs; and that Sumner Wallace and the Union National Bank of Omaha, Nebraska, have and recover against Edgar M. Morsman the sum of twenty dollars for their costs herein and have execution therefor.

December 8, 1904.

(Petition for Allowance of Appeal and Assignment of Errors in Cause No. 1956.)

And on the twenty-seventh day of January, A. D. 1905, a petition for allowance of an appeal and an assignment of errors was filed in the case of Morsman vs. Wallace, *et al.*, No. 1956, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

EDGAR M. MORSMAN, Appellant,
vs.
SUMNER WALLACE ET AL., Appellees. } No. 1956. In Equity.

Petition for Allowance of Appeal.

To the honorable the judges of the circuit court of appeals aforesaid:

The appellant, Edgar M. Morsman, represents:

That heretofore, to-wit: on the 8th day of December, A. D. 1904, the circuit court of appeals aforesaid rendered a final decree in the above entitled cause, affirming the decree of the circuit court of the United States for the district of Nebraska rendered on the 16th day

of May A. D. 1903, and by which decree of the circuit court appellant was adjudged and decreed to pay to the appellee Sumner Wallace, the sum of $1744.50 and also to pay to the appellee Union National Bank, the sum of $5547.75.

That said suit was originally instituted in the said circuit court, and the jurisdiction of said circuit court was invoked by the appellee, Sumner Wallace, as plaintiff in said suit, on the ground of diverse citizenship, and also on the ground that the case was one arising under the laws of the United States, and the jurisdiction of the circuit court was sustained by the circuit court of appeals on the ground that the suit was one arising under the laws of the United States.

That the decree of the circuit court on the merits was not one which the Supreme Court of the United States might have reviewed by direct appeal from, or writ of error to, the circuit court, nor is the case one in which, by the judiciary act of 1891, the decree of the circuit court of appeals is made final, but the appellant is by the said act entitled to an appeal, by right, to the Supreme Court of the United States.

Appellant avers that the decree of the United States circuit court of appeals, affirming the decree of the circuit court aforesaid is erroneous and prejudicial, that is to say:

Specification of Errors.

(1.) The circuit court of appeals erred in its decree affirming the decree and judgment of the circuit court for the district of Nebraska; that is to say, in holding that the suit is one to wind up the affairs of a national bank and a suit arising under the laws of the United States of which the circuit court had jurisdiction.

(2.) The circuit court of appeals erred in its interpretation of the contract of December 21, 1895, between the American national bank and the Union national bank and in holding the same to be merely a contract by which, "the Union national bank assumed the payment of the liabilities of the American national to its depositors and on account of bills payable, and in return was to receive its cash, cash items and such bills receivable as the former was willing to accept at par and without recourse. The difference between the aggregate of the amounts so received and the gross amount of liabilities assumed was to be represented by three non-negotiable promissory notes of the American national, the payment of which was to be secured by a pledge of all of its remaining assets to Thomas L. Kimball as trustee," which erroneous interpretation was material to the final conclusion of the court.

(3.) The circuit court of appeals erred in holding that the contract of December 21, 1895, between the American national bank and the Union national bank, had been ratified by the shareholders of the American national bank, and that the individual liability of shareholders under section 5151 of the Revised Statutes of the United States might, therefore, be enforced.

(4.) The circuit court of appeals erred in holding that the complainant-, Sumner Wallace and Union national bank could go behind the contract of December 21, 1895, and that their claims were, in equity, for the "contracts, debts and engagements" of the American national bank, for which shareholders are made individually liable, under section 5151 of the Revised Statutes.

Wherefore appellant prays the allowance of an appeal to operate as a supersedeas, the signing of citation and the approval of his supersedeas bonds herewith tendered, to the end that the said cause may be removed to the Supreme Court of the United States, and there be reviewed and reversed.

WESTEL W. MORSMAN,
Solicitor for Edgar M. Morsman.

(Endorsed): 1956. United States circuit court of appeals, eighth circuit. Edgar M. Morsman, appellant, *vs.* Sumner Wallace, *et al.*, appellees. Petition for allowance of appeal and assignment of errors. Filed Jan. 27, 1905, John D. Jordan, clerk.

(Supersedeas Bond to Sumner Wallace in Cause No. 1956.)

And on the twenty-seventh day of January, A. D. 1905, a supersedeas bond to Sumner Wallace was filed in the case of Morsman *vs.* Wallace, *et al.*, No. 1956, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Judicial Circuit.

EDGAR M. MORSMAN, Appellant,
vs.
SUMNER WALLACE ET AL., Appellees.
} No. 1956. Supersedeas Bond.

Know all men by these presents: That we, Edgar M. Morsman of the county of Douglas and State of Nebraska, as principal, and Casper E. Yost of the same county and State as surety, are jointly and severally held and firmly bound unto Sumner Wallace, his heirs and assigns in the penal sum of $3500.00, lawful money of the United States, well and truly to be paid.

The condition of the foregoing obligation is such that:

Whereas, the above bounden Edgar M Morsman, has appealed from the decree and judgment of the United States circuit court of appeals for the eighth judicial circuit in a certain cause therein pending wherein the said Edgar M. Morsman is appellant and Sumner Wallace and Union National Bank are appellees, and wherein decree and judgment was rendered against the said Edgar M. Morsman affirming the decree and judgment in said cause rendered by the

United States circuit court for the district of Nebraska, adjudging the said Edgar M. Morsman to pay to the said Sumner Wallace the sum of $1744.50.

Now therefore, if the said Edgar M. Morsman, appellant in said cause shall prosecute his said appeal to effect and answer and pay all damages and costs if he fail to make good his appeal, then this obligation to be null and void, otherwise in full force and virtue.

Witness our hands the 19th day of January, A. D. 1905.

EDGAR M. MORSMAN.
CASPER E. YOST.

If this bond was presented to me for approval I should consider surety sufficient & approve same.

W. H. MUNGER.

Approved January 27, 1905.

WALTER H. SANBORN,
Circuit Judge.

(Endorsed): No. 1956. United States circuit court of appeals, eighth circuit. Edgar M. Morsman, appellant, *vs.* Sumner Wallace, *et al.*, appellees. Supersedeas bond to Sumner Wallace. Filed Jan. 27, 1905, John D. Jordan, clerk.

(Supersedeas Bond to Union National Bank in Cause No. 1956.)

And on the twenty-seventh day of January, A. D. 1905, a supersedeas bond to the Union national bank was filed in the case of Morsman *vs.* Wallace, *et al.*, No. 1956, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

EDGAR M. MORSMAN, Appellant,
vs.
SUMNER WALLACE ET AL., Appellees.
} No. 1956. Supersedeas Bond.

Know all men by these presents:

That we, Edgar M. Morsman, of the county of Douglas and State of Nebraska, as principal, and Casper E. Yost of the same county and State, as surety, are jointly and severally held and firmly bound unto Union National Bank, its successors and assigns, in the penal sum of ten thousand dollars, ($10,000.00) lawful money of the United States, well and truly to be paid.

The condition of the foregoing obligation is such that:

Whereas the above bounden Edgar M. Morsman has appealed from the decree and judgment of the United States circuit court of

appeals for the eighth judicial circuit, in a certain cause therein pending wherein the said Edgar M. Morsman is appellant and Sumner Wallace and Union National Bank are appellees, and wherein the United States circuit court of appeals has affirmed a judgment rendered against the said Edgar M. Morsman in said cause for the sum of $5547.75, in favor of the said Union National Bank of Omaha, Nebraska,

Now therefore, if the said Edgar M. Morsman, appellant in said cause, shall prosecute his said appeal to effect and answer and pay all damages and costs if he fail to make good his plea, then this obligation to be null and void, but otherwise in full force and virtue.

Witness our hands the 19th day of Jan'y A. D. 1905.

EDGAR M. MORSMAN.
CASPER E. YOST.

If this bond was presented to me for approval I should consider the surety good and approve same.

W. H. MUNGER.

Approved January 27, 1905.

WALTER H. SANBORN,
Circuit Judge.

(Endorsed:) No. 1956. United States circuit court of appeals, eighth circuit. Edgar M. Morsman, appellant, *vs.* Sumner Wallace, *et al.*, appellees. Supersedeas bond to Union national bank. Filed Jan. 27, 1905, John D. Jordan, clerk.

(Order Allowing Appeal in Cause No. 1956.)

And on the twenty-seventh day of January, A. D. 1905, in the record of the proceedings of said circuit court of appeals is an order allowing an appeal to Edgar M. Morsman in the case of Morsman *vs.* Wallace, *et al.*, No. 1956, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1904.

FRIDAY, January 27, 1905.

EDGAR M. MORSMAN, Appellant,
vs.
SUMNER WALLACE ET AL., Appellees. } No. 1956.

Order Allowing Appeal.

Now on this 27th day of January A. D. 1905, on hearing the petition of Edgar M. Morsman, one of the appellants in the above entitled cause, the same being presented in open court, it is ordered that an appeal be and the same is hereby allowed to operate as a supersedeas upon security being given as required by law.

January 27, 1905.

(Citation in Cause No. 1956.)

And on the thirtieth day of January, A. D. 1905, a citation on the appeal of Edgar M. Morsman was filed in the case of Morsman *vs.* Wallace, *et al.*, No. 1956, the original of which, with the acknowledgment of service by counsel for appellees endorsed thereon, is hereto attached and herewith returned.

THE UNITED STATES OF AMERICA:

To Sumner Wallace and The Union National Bank of Omaha, Nebraska, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein Edgar M. Morsman is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said Edgar M. Morsman, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, presiding judge of the United States circuit court of appeals for the eighth circuit, this twenty-seventh day of January in the year of our Lord one thousand nine hundred and five.

WALTER H. SANBORN,
Presiding Judge of the United States
Court of Appeals for the Eighth Circuit.

(Endorsed:) No. — United States circuit court of appeals, eighth circuit. Edgar M. Morsman, appellant, *vs.* Sumner Wallace *et al.* Citation on appeal. Filed Jan. 30 1905 John D. Jordan, clerk.

Due and legal service of the foregoing citation is acknowledged this 28th day of January, A. D. 1905.

RICHARD L. HALL,
Counsel for Sumner Wallace and The Union
National Bank of Omaha, Nebraska.

(Decree in Cause No. 1957.)

And on the eighth day of December, A. D. 1904, in the record of the proceedings of said circuit court of appeals is a decree in the case of Poppleton *vs.* Wallace, *et al.*, No. 1957, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1904.

THURSDAY, December 8, 1904.

WILLIAM S. POPPLETON, Appellant,
vs.
SUMNER WALLACE and UNION NATIONAL BANK OF Omaha, Nebraska. } No. 1957.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause, be, and the same is hereby, affirmed with costs; and that Sumner Wallace and The Union National Bank of Omaha, Nebraska, have and recover against William S. Poppleton the sum of twenty dollars for their costs herein and have execution therefor.

December 8, 1904.

(Petition for Allowance of Appeal in Cause No. 1957.)

And on the sixth day of February, A. D. 1905, a petition for the allowance of an appeal was filed in the case of Poppleton *vs.* Wallace, *et al.*, No. 1957, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

WILLIAM S. POPPLETON, Appellant,
vs.
SUMNER WALLACE ET AL., Appellees. } No. 1957.

Petition for Allowance of Appeal.

To the honorable the judges of the circuit court of appeals:

Now comes William S. Poppleton, appellant in the above entitled action and represents:

1st. That heretofore to-wit, on the 8th day of December A. D. 1904, the circuit court of appeals aforesaid, rendered a final decree in the above entitled cause affirming the decree of the circuit court of the United States for the district of Nebraska, rendered on the 16th day of May, 1903, by which decree of the circuit court, said

appellant William S. Poppleton, was adjudged and decreed to pay to the appellee Sumner Wallace, the sum of $1308.37 and also to the appellee Union National Bank, the sum of $4160.81; and that by said decree of said circuit court, each of said appellants was adjudged and decreed to pay said Sumner Wallace and said Union National Bank respectively, interest at the rate of 7 % per annum upon the several amounts adjudged to be due them from May 1st, 1903.

2nd. That said suit was originally instituted in the said circuit court and the jurisdiction of said circuit court was invoked by the appellee, Sumner Wallace as plaintiff in said suit on the ground of diverse citizenship, and also on the ground that the case was one arising under the laws of the United States and the jurisdiction of the circuit court was sustained by the circuit court of appeals on the ground that the suit was one arising under the laws of the United States.

3rd. That the decree of the circuit court on the merits was not one which the Supreme Court of the United States might have reviewed by direct appeal from, or writ of error to, the circuit court, nor is the case — in which, by the judiciary act of 1891, the decree of the circuit court of appeals is made final, but the appellant is by said act entitled to an appeal by right to the Supreme Court of the United States.

4th. Said appellant further avers that the decree of the United States circuit court of appeals, affirming the decree of the circuit court aforesaid, is erroneous and prejudicial and conceiving himself aggrieved by said decree, does hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment and specification of errors filed herewith and prays that this appeal may be allowed and that a transcript of the record, proceedings and all papers upon which said decree was made duly authenticated, may be sent to the Supreme Court of the United States.

Dated February 4th, 1905.

WILLIAM S. POPPLETON,
By RICHARD S. HORTON,
His Solicitor.

(Endorsed:) No. 1957. In the United States circuit court of appeals for the eighth circuit. William S. Poppleton, appellant, *vs.* Sumner Wallace, *et al.*, appellees. Petition for allowance of appeal. Filed Feb. 6, 1905, John D. Jordan, clerk. Richard S. Horton, attorney for appellant.

(Assignment of Errors in Cause No. 1957.)

And on the sixth day of February, A. D. 1905, an assignment of errors was filed in the case of Poppleton *vs.* Wallace, *et al.*, No. 1957, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

WILLIAM S. POPPLETON, Appellant,
vs.
SUMNER WALLACE ET AL., Appellees. } No. 1957.

Assignment and Specification of Errors.

Comes now William S. Poppleton, appellant in the above entitled action and states that the decree in said cause is erroneous and against the just rights of this appellant for the following reasons, to-wit:

1st. That the circuit court of appeals erred in its decree in holding it was not essential to the maintenance of the suit in the court below (to-wit in said circuit court for the district of Nebraska) that the complainant (Sumner Wallace) should have first reduced his demand to judgment.

2nd. That the circuit court of appeals erred in its decree affirming the decree and judgment of the circuit court for the district of Nebraska; that is to say, in holding that the suit is one to wind up the affairs of a national bank and a suit arising under the laws of the United States of which the circuit court had jurisdiction.

3rd. That the circuit court of appeals erred in its interpretation of the contract of December 21, 1895, between the American national bank and the Union national bank and in holding the same to be merely a contract by which "the Union national bank assumed the payment of the liabilities of the American national to its depositors and on account of bills payable, and in return was to receive its cash, cash items and such bills receivable as the former was willing to accept at par and without recourse. The difference between the aggregate of the amount received and the gross amount of liabilities assumed was to be represented by three non-negotiable promissory notes of the American national, the payment of which was to be secured by a pledge of all of its remaining assets to Thomas L. Kimball as trustee," which erroneous interpretation was material to the final conclusions of the court.

4th. That the circuit court of appeals erred in holding that the contract of December 21st, 1895, between the American national bank and the Union national bank had been ratified by the shareholders of the American national bank, and that the individual liability of shareholders under section 5151 of the Revised Statutes of the United States might, therefore be enforced.

5th. That the circuit court of appeals erred in holding that the complainants, Sumner Wallace and Union National Bank could go behind the contract of December 21, 1895, and that their claims were, in equity for the "contract-, debts and engagements" of the

American national bank, for which shareholders are made individually liable, under section 5151 of the Revised Statutes.

6th. That the circuit court of appeals erred in holding that said appellant had ratified the contract of December 21st, 1895.

7th. That said circuit court of appeals erred in holding that the other stockholders of the American national bank could ratify said contract of December 21st, 1895, on behalf of said appellant and in holding that said appellant was bound by the *ultra vires* acts of the directors of said American national bank by reason of the alleged conduct of and ratification by a majority of the other stockholders of said American national bank.

8th. That the circuit court of appeals erred in holding that the computation of interest upon the claims of the creditors upon which was based a decree of said circuit court, was not made subject of an assignment of error and erred in refusing to consider the complaint of appellant in that behalf.

Wherefore said appellant, William S. Poppleton, prays that said decree be reversed and that he may have such other and further relief as he may be entitled to receive.

WILLIAM S. POPPLETON,
By RICHARD S. HORTON,
His Solicitor.

(Endorsed:) No. 1957. In the United States circuit court of appeals for the eighth circuit. William S. Poppleton, appellant, *vs.* Sumner Wallace *et al.*, appellees. Assignment and specification of errors. Filed Feb. 6, 1905, John D. Jordan, clerk. Richard S. Horton, attorney for appellant.

(Supersedeas Bond to Sumner Wallace in Cause No. 1957.)

And on the sixth day of February, A. D. 1905, a supersedeas bond to Sumner Wallace was filed in the case of Poppleton *vs.* Wallace *et al.*, No. 1957, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit

WILLIAM S. POPPLETON, Appellant,
vs.
SUMNER WALLACE ET AL., Appellees.
} No. 1957. Supersedeas Bond.

Know all men by these presents, That we, William S. Poppleton as principal and American Surety Company of New York as surety, are jointly and severally held and firmly bound unto Sumner Wallace, his heirs, executors and administrators, in the penal sum of $4000.00 in lawful money of the United States well and truly to be paid.

The condition of the foregoing obligation is such that whereas the

above bounden William S. Poppleton has appealed from the decree and judgment of the United States circuit court of appeals for the eighth circuit, in a certain cause therein pending wherein said William S. Poppleton is appellant and Sumner Wallace and The Union National Bank are appellees and,

Whereas the United States circuit court of appeals has affirmed the judgment rendered against said William S. Poppleton in said cause in the sum of $1308.37 in favor of Sumner Wallace

Now therefore if the said William S. Poppleton, appellant in said cause, shall prosecute his said appeal to effect, and answer and pay all damages and costs if he fail to make good his plea, then this obligation to be null and void but otherwise in full force and virtue.

Witness our hands this 1st day of February, A. D. 1905.

WILLIAM S. POPPLETON.
[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By MATTHEW A. HALL,
Resident Vice-Pres't.
Attest: FREDERICK J. BURNETT,
Resident Ass't Sec'y.

Bond and surety approved this sixth day of February, 1905.
WALTER H. SANBORN,
Presiding Judge.

(Endorsed:) No. 1957. In the United States circuit court of appeals of the eighth circuit. William S. Poppleton, appellant, *vs.* Sumner Wallace, *et al.*, appellees. Supersedeas bond to Sumner Wallace. Filed Feb. 6, 1905. John D. Jordan, clerk. Richard S. Horton, attorney for appellant.

(Supersedeas Bond to Union National Bank in Cause No. 1957.)

And on the sixth day of February, A. D. 1905, a supersedeas bond to the Union National Bank was filed in the case of Poppleton *vs.* Wallace, *et al.*, No. 1957, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

WILLIAM S. POPPLETON, Appellant, *vs.* UNION NATIONAL BANK and SUMNER WALLACE, Appellees.	# 1957.	Supersedeas Bond.

Know all men by these presents: That we, William S. Poppleton as principal and the American Surety Company of New York as surety, are jointly and severally held and firmly bound unto the

Union National Bank, its successors and assigns, in the penal sum of $10,000.00, in lawful money of the United States well and truly to be paid.

The condition of the foregoing obligation is such that whereas the above bounden William S. Poppleton has appealed from the decree and judgment of the United States circuit court of appeals for the eighth circuit in a certain cause therein pending wherein said William S. Poppleton is appellant and Sumner Wallace and The Union National Bank are appellees and,

Whereas the United States circuit court of appeals has affirmed the judgment rendered against said William S. Poppleton in said cause in the sum of $4160.81 in favor of the Union National Bank.

Now therefore if the said William S. Poppleton, appellant in said cause shall prosecute his said appeal to effect, and answer and pay all damages and costs if he fail to make good his plea, then this obligation to be null and void, but otherwise to remain in full force and virtue.

Witness our hands this 1st day of February, A. D. 1905.

WILLIAM S. POPPLETON.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,

By MATTHEW A. HALL,
Resident Vice-Pres't.

Attest: FREDERICK J. BURNETT,
Resident Ass't Sec'y.

Bond and surety approved this sixth day of February, 1905.

WALTER H. SANBORN,
Presiding Judge of the U. S. Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) No. 1957. In the United States circuit court of appeals of the eighth circuit. William S. Poppleton, appellant, *vs.* Union National Bank and Sumner Wallace, appellees. Supersedeas bond to Union National Bank. Filed Feb. 6, 1905, John D. Jordan, clerk. Richard S. Horton, attorney for appellant.

(Order Allowing Appeal in Cause No. 1957.)

And on the sixth day of February, A. D. 1905, in the record of the proceedings of said circuit court of appeals is an order allowing an appeal in the case of Poppleton *vs.* Wallace, *et al.*, No. 1957, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1904.

MONDAY, February 6, 1905.

WILLIAM S. POPPLETON, Appellant,
vs.
SUMNER WALLACE ET AL., Appellees. } No. 1957. Order.

At a stated term to-wit, the December term A. D. 1904, of the United States circuit court of appeals of the eighth circuit, held in the court room, of the city of St. Louis, State of Missouri, on the sixth day of February, 1905.

In open court on motion of Richard S. Horton, Esq., solicitor and of counsel for appellant, it is ordered that an appeal to the Supreme Court of the United States from the final decree heretofore filed and entered herein, be and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein be forthwith transmitted to the said Supreme Court of the United States. It is further ordered that said appellant furnish a bond of $10,000.00 to the appellee Union National Bank, and $4000.00 to appellee Sumner Wallace, said bonds to act as supersedeas bonds and also as bonds for costs and damages on appeal.

February 6, 1905.

(Citation on Appeal in Cause No. 1957.)

And on the twenty-fourth day of February, A. D. 1905, a citation on the appeal of William S. Poppleton was filed in the case of Poppleton *vs.* Wallace, *et al.*, No. 1957, the original of which, with the acceptance of service endorsed thereon, is hereto attached and herewith returned.

THE UNITED STATES OF AMERICA:

To Sumner Wallace and the Union National Bank of Omaha, Nebraska, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the U. S. circuit court of appeals for the eighth circuit wherein William S. Poppleton is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, presiding judge of the U. S. circuit court of appeals for the eighth circuit this sixth day of February in the year of our Lord one thousand nine hundred and five.

WALTER H. SANBORN,
Presiding Judge of the U. S. Circuit Court of
Appeals for the Eighth Circuit.

[Endorsed:] R. S. Horton. No. —. United States Supreme Court. William S. Poppleton appellant, *vs.* Sumner Wallace, *et al.* Citation on appeal. Filed Feb. 2 41905 John D. Jordan, clerk.

Service of the foregoing citation is hereby accepted.
SUMNER WALLACE,
By HALL & McCULLOUGH,
His Solicitors.
UNION NATIONAL BANK,
By HALL & McCULLOUGH,
Its Solicitors.

(Decree in Cause No. 1959.)

And on the eighth day of December, A. D. 1904, in the record of the proceedings of said circuit court of appeals is a decree in the case of McCague Investment Company, *et al.*, *vs.* Wallace, *et al.*, No. 1959, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1904.

THURSDAY, December 8, 1904.

THE McCAGUE INVESTMENT COMPANY, THOMAS H. McCague, Alex. G. Charlton, Anna C. Crowell, George W. McClellan, Executor of the Last Will and Testament of Robert H. McClellan, Deceased; Emily J. Robinson, John Speer, Robert L. Brownlee, Caroline Carpenter, George Marples, J. H. Hawkins, John L. McCague, and John L. McCague, Thomas H. McCague, William L. McCague, and Alex. G. Charlton, Partners under Firm Name and Style of McCague Brothers, and Rufus B. Bullock, Appellants,
vs.
SUMNER WALLACE and UNION NATIONAL BANK OF Omaha, Nebraska. } No. 1959.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause, be, and the same is hereby, affirmed with costs; and that Sumner Wallace and the Union National Bank of Omaha, Nebraska, have and recover against The McCague Investment Company, Thomas H. McCague, Alex. G. Charlton, Anna C. Crowell, George W. McClellan, executor of the last will and testament of Robert H. McClellan, deceased, Emily J. Robinson, John Speer, Robert L. Brownlee, Caroline Carpenter, George Marples, J. H. Hawkins, John L. McCague, and John L. McCague, Thomas H. McCague, William L. McCague and Alex. G. Charlton, partners under the firm name and style of McCague Brothers, and Rufus B. Bullock, the sum of twenty dollars for their costs herein and have execution therefor.

December 8, 1904.

(Suggestion of Death and Stipulation for Order of Revivor as to J. H. Hawkins, Deceased, in Cause No. 1959.)

And on the sixth day of February, A. D. 1905, a suggestion of death and stipulation for order of revivor as to J. H. Hawkins, deceased, was filed in the case of McCague Investment Co., *et al.*, vs. Wallace, *et al.*, No. 1959, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE MCCAGUE INVESTMENT COMPANY *et al.*, Appellants, vs. SUMNER WALLACE ET AL., Appellees.	No. 1959.	Suggestion of Death.

Now come George S. Hawkins and John A. Kitchcart as executors of the last will and testament of J. H. Hawkins, deceased, and show to the court that the said J. H. Hawkins, one of the appellants in the above entitled cause, died on the 25th day of August, 1904, and that the said George S. Hawkins and John A. Kitchcart have been regularly and legally appointed as executors of the last will and testament of the said J. H. Hawkins, and have qualified and are acting as such executors.

The said George S. Hawkins and John A. Kitchcart as executors of the last will and testament of J. H. Hawkins, deceased, move the court for an order reviving this action in their names as such executors.

February 2, 1905.

CHARLES BATTELLE,

Solicitors for George S. Hawkins and John A. Kitchcart, as Executors of the Last Will and Testament of J. H. Hawkins, Deceased.

Now come Sumner Wallace and The Union National Bank of Omaha, Nebraska, appellees in the above entitled action and hereby consent, and each of them consents, that an order be entered reviving this action in the names of George S. Hawkins and John A. Kitchcart, as executors of the last will and testament of J. H. Hawkins, deceased.

SUMNER WALLACE.
UNION NATIONAL BANK,
By HALL & McCULLOCH,
Solicitors for said Appellees.

(Endorsed:) No. 1959. In the United States circuit court of appeals, eighth circuit. The McCague Investment Company, *et al.*, appellants, *vs.* Sumner Wallace, *et al.*, appellees. Suggestion of death and stipulation for order of revivor as to J. H. Hawkins, deceased. Filed Feb. 6, 1905, John D. Jordan, clerk. Chas. Battelle, Omaha, Neb., solicitor.

(Order Reviving Cause as to J. H. Hawkins, Deceased, in Case No. 1959.)

And on the sixth day of February, A. D. 1905, in the record of the proceedings of said circuit court of appeals is an order reviving cause as to J. H. Hawkins, deceased, in the case of McCague Investment Co., *et al.*, *vs.* Wallace, *et al.*, No. 1959, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1904.

MONDAY, February 6, 1905.

THE McCAGUE INVESTMENT COMPANY ET AL., Appellants, *vs.* SUMNER WALLACE ET AL., Appellees. } No. 1959. Order.

Now on this sixth day of February, 1905, this cause coming on to be heard upon the motion of George S. Hawkins and John A. Kitchcart as executors of the last will and testament of J. H. Hawkins, deceased, suggesting the death of the said J. H. Hawkins on the 25th day of August, 1904, and praying the court for an order reviving the said action in the names of said George S. Hawkins and John A. Kitchcart as executors of the estate of J. H. Hawkins, deceased, and it appearing that Sumner Wallace and The Union National Bank, appellees in said action have consented to the entry of such order, said motion is sustained.

It is therefore hereby ordered, adjudged and decreed that said

action be, and the same hereby is, revived in the names of George S. Hawkins and John A. Kitchcart as executors of the last will and testament of J. H. Hawkins, deceased.

February 6, 1905.

(Petition for Allowance of Appeal by George W. McClellan, as Executor, &c., *et al.* in Cause No. 1959.)

And on the sixth day of February, A. D. 1905, a petition for the allowance of an appeal by George W. McClellan, as executor, &c., *et al.*, was filed in the case of McCague Investment Co., *et al.*, *vs.* Wallace, *et al.*, No. 1959, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE MCCAGUE INVESTMENT COMPANY ET AL., Appellants, *vs.* SUMNER WALLACE ET AL., Appellees. } No. 1959. In Equity.

Petition for Allowance of Appeal.

To the honorable the judges of the circuit court of appeals:

Now come George W. McClellan as executor of the last will and testament of Robert H. McClellan, deceased, R. L. Brownlee, Caroline Carpenter, George Marples, and George S. Hawkins and John A. Kitchcart as executors of the last will and testament of J. H. Hawkins, deceased, appellants in the above entitled action and represent, and now comes each of said appellants and represents:

1. That heretofore, to-wit: on the 8th day of December A. D. 1904, the circuit court of appeals as aforesaid rendered a final decree in the above entitled cause, affirming the decree of the circuit court of the United — for the district of Nebraska, rendered on the 16th day of May, 1903, by which decree of the circuit court said appellant George W. McClellan as executor of the last will and testament of Robert H. McClellan, deceased, was adjudged and decreed to pay to the appellee Sumner Wallace, the sum of $1163.00 and also to pay to the appellee, The Union National Bank, the sum of $3698.50, and said appellant R. L. Brownlee was adjudged and decreed to pay to the appellee Sumner Wallace the sum of $581.50, and also to pay to the appellee The Union National Bank the sum of $1849.25; and said appellant Caroline Carpenter was adjudged and decreed to pay to the appellee Sumner Wallace the sum of $418.68, and also to pay to the appellee The Union National Bank the sum of $1331.46; and said appellant George Marples was adjudged and decreed to pay to the appellee Sumner Wallace the sum of $348.90, and also to pay to the appellee The Union National Bank, the sum of $1109.55; and said

appellant J. H. Hawkins who has since died *died* and said action having been revived in the name- of George S. Hawkins and John A. Kitchcart as executors of the last will and testament of the said J. H. Hawkins, deceased, was adjudged and decreed to pay to the appellee Sumner Wallace the sum of $581.50, and also to pay to the appellee The Union National Bank the sum of $1849.25; and that by said decree of said circuit court each of said appellants was adjudged and decreed to pay said Sumner Wallace and to said Union national bank respectively, interest at the rate of six per cent. per annum upon the several amounts adjudged to be due them from May 1, 1903.

2. That said suit was originally instituted in the said circuit court and the jurisdiction of said circuit court was invoked by the appellee Sumner Wallace as plaintiff in said suit on the ground of diverse citizenship, and also on the ground that the case was one arising under the laws of the United States and the jurisdiction of the circuit court was sustained by the circuit court of appeals on the ground that the suit was on- arising under the laws of the United States.

3. That the decree of the circuit court on the merits was not one which the Supreme Court of the United States might have reviewed by direct appeal from, or writ of error to, the circuit court, nor is the case one in which, by the judiciary act of 1891, the decree of the circuit court of appeals is made final, but the appellant is by the said act entitled to an appeal by right to the Supreme Court of the United States.

4. That appellants aver, and each of them avers, that the decree of the United States circuit court of appeals affirming the decree of the circuit court aforesaid, is erroneous and prejudicial and conceiving themselves aggrieved by said decree do, and each of them does, hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment and specifications of errors filed herewith, and pray, and each of them prays, that this appeal may be allowed and that a transcript of the record, proceedings and all papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated Feb'y 2, 1905.

GEORGE W. McCLELLAN,
As Executor of the Last Will and Testament of
Robert H. McClellan, Deceased,
R. L. BROWNLEE,
CAROLINE CARPENTER,
GEORGE MARPLES,
GEORGE S. HAWKINS AND
JOHN A. KITCHCART,
As Executors of the Last Will and Testament
of J. H. Hawkins, Deceased,
By CHAS. BATTELLE,
Their Solicitor.

(Endorsed:) No. 1959. In the United States circuit court of appeals, eighth circuit. The McCague Investment Co., *et al.*, appellants, *vs.* Sumner Wallace, *et al.*, appellees. Petition for allowance of an appeal by George W. McClellan, as executor &c., *et al.* Filed Feb. 6, 1905. John D. Jordan, clerk. Charles Battelle, Omaha, Nebraska, solicitor.

(Assignment of Errors by George W. McClellan, as Executor, &c., *et al.* in Cause No. 1959.)

And on the sixth day of February, A. D. 1905, an assignment of errors by George W. McClellan, as executor &c., *et al.*, was filed in the case of McCague Investment Co., *et al.*, *vs.* Wallace, *et al.*, No. 1959, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE MCCAGUE INVESTMENT COMPANY ET AL., Appellants, *vs.* SUMNER WALLACE ET AL., Appellees. } No. 1959.

Assignment and Specification of Errors.

Now come George W. McClellan as executor of the last will and testament of Robert H. McClellan, deceased, R. L. Brownlee, Caroline Carpenter, George Marples, and George S. Hawkins and John A. Kitchcart as executors of the last will and testament of J. H. Hawkins, deceased, appellants in the above entitled action, and say, and each of them says, that the decree in said cause is erroneous and against the just rights of these appellants and each of them for the following reasons, to-wit:

1. That the circuit court of appeals erred in its decree in holding it was not essential to the maintenance of the suit in the court below (to-wit: in said circuit court for the district of Nebraska) that the complainant (Sumner Wallace) should have first reduced his demand to judgment.

2. That the circuit court of appeals erred in its decree affirming the decree and judgment of the circuit court for the district of Nebraska; that is to say, in holding that the suit is one to wind up the affairs of a national bank and a suit arising under the laws of the United States of which the circuit court had jurisdiction.

3. That the circuit court of appeals erred in its interpretation of the contract of December 21, 1895, between the American national bank and the Union national bank, and in holding the same to be merely a contract by which "The Union national bank assumed the payment of the liabilities of the American national to its depositors

and on account of bills payable, and in return to receive its cash, cash items and such bills receivable as the former was willing to accept at par and without recourse. The difference between the aggregate of the amounts so received and the gross amount of liabilities assumed was to be represented by three non-negotiable promissory notes of the American national, the payment of which was to be secured by a pledge of all its remaining assets to Thomas L. Kimball as trustee," which erroneous interpretation was material to the final conclusion of the court.

4. That the circuit court of appeals erred in holding that the contract of December 21, 1895, between the American national bank and the Union national bank, had been ratified by the shareholders of the American national bank, and that the individual liability of the shareholders under section 5151 of the Revised Statutes of the United States might, therefore be enforced.

5. That the circuit court of appeals erred in holding that the complainant-, Sumner Wallace and Union National Bank could go behind the contract of December 21, 1895, and that their claims were, in equity, for the "contracts, debts and engagements" of the American national bank, for which shareholders are made individually liable, under section 5151 of the Revised Statutes.

6. That the circuit court of appeals erred in holding that the computation of interest upon the claims of the creditors, upon which was based the decree of said circuit court, was not made the subject of an assignment of error and erred in refusing to consider the complaint of the appellants in that behalf.

Wherefore, these appellants pray, and each of them prays, that said decree be reversed and that they, and each of them, may have such other and further relief as they may be entitled to receive.

GEORGE W. McCLELLAN,
As Executor of the Last Will and Testament
of Robert H. McClellan, Deceased,
R. L. BROWNLEE,
CAROLINE CARPENTER,
GEORGE MARPLES,
GEORGE S. HAWKINS AND
JOHN A. KITCHCART,
As Executors of the Last Will and Testament
of J. H. Hawkins, Deceased,
By CHAS. BATTELLE, Their Solicitor.

(Endorsed:) No. 1959. In the United States circuit court of appeals, 8th circuit. The McCague Investment Company, *et al.*, appellants, *vs.* Sumner Wallace, *et al.*, appellees. Assignment and specification of errors by George W. McClellan, as executor, &c., *et al.* Filed Feb. 6, 1905, John D. Jordan, clerk. Chas. Battelle, Omaha, Nebraska, solicitor.

(Appeal Bond of George W. McClellan, as Executor, &c., *et al.* in Cause No. 1959.)

And on the sixth day of February, A. D., 1905, a bond on the appeal of George W. McClellan, as executor &c., *et al.*, was filed in the case of McCague Investment Co., *et al.*, *vs.* Wallace, *et al.*, No. 1959, in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

THE McCAGUE INVESTMENT CO. ET AL., Appellants, *vs.* SUMNER WALLACE ET AL., Appellees. } No. 1959. Cost Bond.

Know all men by these presents, that we, George W. McClellan as executor of the last will and testament of Robert H. McClellan, deceased, R. L. Brownlee, Caroline Carpenter, George Marples, and George S. Hawkins and John A. Kitchcart as executors of the last will and testament of J. H. Hawkins, deceased, as principal, are each held and firmly bound unto Sumner Wallace, his heirs, executors, administrators or assigns, and to The Union National Bank of Omaha, Nebraska, its successors and assigns, and to each of them, and we The United States Fidelity and Guaranty Company as surety are held and firmly bound unto Sumner Wallace, his heirs, executors, administrators or assigns, and to the Union National Bank of Omaha, Nebraska, its successors and assigns, and to each of them, for each of the above named principals in the penal sum of three hundred (300) dollars lawful money of the United States, well and truly to be paid:

The condition of the foregoing obligation is such that:

Whereas, the above bounden George W. McClellan as executor of the last will and testament of Robert H. McClellan, deceased, R. L. Brownlee, Caroline Carpenter, George Marples, and George S. Hawkins and John A. Kitchcart as executors of the last will and testament of J. H. Hawkins, deceased, and each of them, has appealed from a decree and judgment of the United States circuit court of appeals for the eighth judicial circuit in a certain cause therein pending, wherein the said George W. McClellan as executor of the last will and testament of Robert H. McClellan, deceased, R. L. Brownlee, Caroline Carpenter, George Marples, and George S. Hawkins and John A. Kitchcart as executors of the last will and testament of J. H. Hawkins, deceased, are appellants, and Sumner Wallace and The Union National Bank of Omaha, Nebraska, are appellees, and wherein the United States circuit court of appeals, eighth circuit, has affirmed a judgment rendered against the said George W. McClellan as executor of the last will and testament of Robert H.

McClellan, deceased, in favor of Sumner Wallace in the sum of $1163.00 and also a judgment in favor of The Union National Bank of Omaha for the sum of $3698.50; and has affirmed a judgment against the said R. L. Brownlee in favor of Sumner Wallace in the sum of $581.50 and also a judgment in favor of the Union national bank for the sum of $1849.25; and has affirmed a judgment against said Caroline Carpenter in favor of Sumner Wallace in the sum of $418.68 and also a judgment in favor of the Union national bank for the sum of $1331.46; and has affirmed a judgment against the said George Marples in favor of Sumner Wallace for the sum of $348.90 and also a judgment in favor of the Union national bank for the sum of $1109.55; and has affirmed a judgment against said J. H. Hawkins (who died pending said appeal and said action has since been revived in the names of George S. Hawkins and John A. Kitchcart as executors of the last will and testament of J. H. Hawkins) in favor of Sumner Wallace in the sum of $581.50 and also a judgment in favor of the Union national bank for the sum of $1849.25.

Now, therefore, if the said above named appellants in said cause, and each of them, shall prosecute said appeals, and each of said appeals, to effect and answer and pay all costs if they, and each of them, fail to make good their pleas, and each of their pleas, then the above obligation to be void, but otherwise to remain in full force and virtue.

Witness our hands this second day of February A. D. 1905.

GEORGE W. McCLELLAN,
As Executor of the Last Will and Testament
of Robert H. McClellan, Deceased,
R. L. BROWNLEE,
CAROLINE CARPENTER,
GEORGE MARPLES,
GEORGE S. HAWKINS AND
JOHN A. KITCHCART,
As Executors of the Last Will and Testament
of J. H. Hawkins, Deceased, Principals,
By CHAS. BATTELLE, Their Solicitor.
[SEAL.] THE UNITED STATES FIDELITY
AND GUARANTY COMPANY,
By B. L. BALDWIN,
Its Attorney in Fact, Surety.

Approved this sixth day of February, 1905.

WALTER H. SANBORN,
Presiding Judge of the United States Circuit
Court of Appeals for the Eighth Circuit.

(Endorsed:) No. 1959. In the United States circuit court of appeals, 8th circuit. The McCague Investment Co., *et al.*, appellants,

vs. Sumner Wallace, *et al.*, appellees. Appeal bond George W. McClellan, as executor, &c., *et al.* Filed Feb. 6, 1905, John D. Jordan, clerk. Chas. Battelle, Omaha, Neb., solicitor.

(Order Allowing Appeal to George W. McClellan, as Executor, &c., *et al.* in Cause No. 1959.)

And on the sixth day of February, A. D. 1905, in the record of the proceedings of said circuit court of appeals is an order allowing an appeal to George W. McClellan as executor, &c., *et al.*, in the case of McCague Investment Co., *et al.*, *vs.* Wallace, *et al.*, No. 1959, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1904.

MONDAY, February 6, 1905.

THE McCAGUE INVESTMENT COMPANY ET AL., Appellants, *vs.* SUMNER WALLACE ET AL., Appellees. } No. 1959. In Equity.

Order Allowing Appeal.

On motion of the solicitor of each of the following named appellants in the above entitled action, to-wit: George W. McClellan as executor of the last will and testament of Robert H. McClellan, deceased, R. L. Brownlee, Caroline Carpenter, George Marples, and George S. Hawkins and John A. Kitchcart as executors of the last will and testament of J. H. Hawkins, deceased, and it appearing that each of said appellants above named has filed a bond for the purpose of appealing to the Supreme Court of the United States, and that all of said bonds have been duly approved:

It is ordered in open court that an appeal to the Supreme Court of the United States from the final decree heretofore filed and entered herein be and the same is allowed said appellants and each of them, and that a certified transcript of the record, testimony, papers and proceedings herein be transmitted forthwith to the Supreme Court of the United States.

February 6, 1905.

(Citation on Appeal in Cause No. 1959.)

And on the sixteenth day of February, A. D. 1905, a citation on the appeal of George W. McClellan, as executor &c., *et al.*, was filed in the case of McCague Investment Co., *et al.*, *vs.* Wallace, *et al.*, No. 1959, the original of which, with the acceptance of service endorsed thereon, is hereto attached and herewith returned.

THE UNITED STATES OF AMERICA:

To Sumner Wallace and The Union National Bank of Omaha, Nebraska, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the U. S. circuit court of appeals for the eighth circuit wherein George W. McClellan, as executor of the last will and testament of Robert H. McClellan, deceased; R. L. Brownlee, Caroline Carpenter, George Marples, and George S. Hawkins and John A. Kitchcart, as executors of the last will and testament of J. H. Hawkins, deceased, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, presiding judge of the U. S. circuit court of appeals for the eighth circuit this sixth day of February in the year of our Lord one thousand nine hundred and five.

WALTER H. SANBORN,
Presiding Judge of the U. S. Circuit Court of Appeals
for the Eighth Circuit.

OMAHA Feb'y 14, 1905.

Service accepted

HALL & McCULLOCH,
Sols. for Sumner Wallace & Un. Nat. Bk.

[Endorsed:] C. W. Battelle. No. — United States Supreme Court, George W. McClellan, executor, etc., *et al.*, appellants *vs.* Sumner Wallace, *et al.* Citation on appeal. Filed Feb. 16 1905 John D. Jordan clerk.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the forogoing transcript consisting of four hundred — sixty-three pages, contains full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of the said circuit court of appeals, in certain causes, wherein Henry F. Wyman, *et al.*, are severally appellants, and Sumner Wallace, *et al.*, appellees; Peter Frenzer, *et al.*, appellants, and Sumner Wallace, *et al.*, appellees; Edgar

M. Morsman appellant, and Sumner Wallace, *et al.*, appellees; William S. Poppleton, appellant, and Sumner Wallace, *et al.*, appellees, and George W. McClellan, as executor, etc., *et al.*, appellants, and Sumner Wallace, *et al.*, appellees, as full, true and complete as the originals now remain on file and of record in my office.

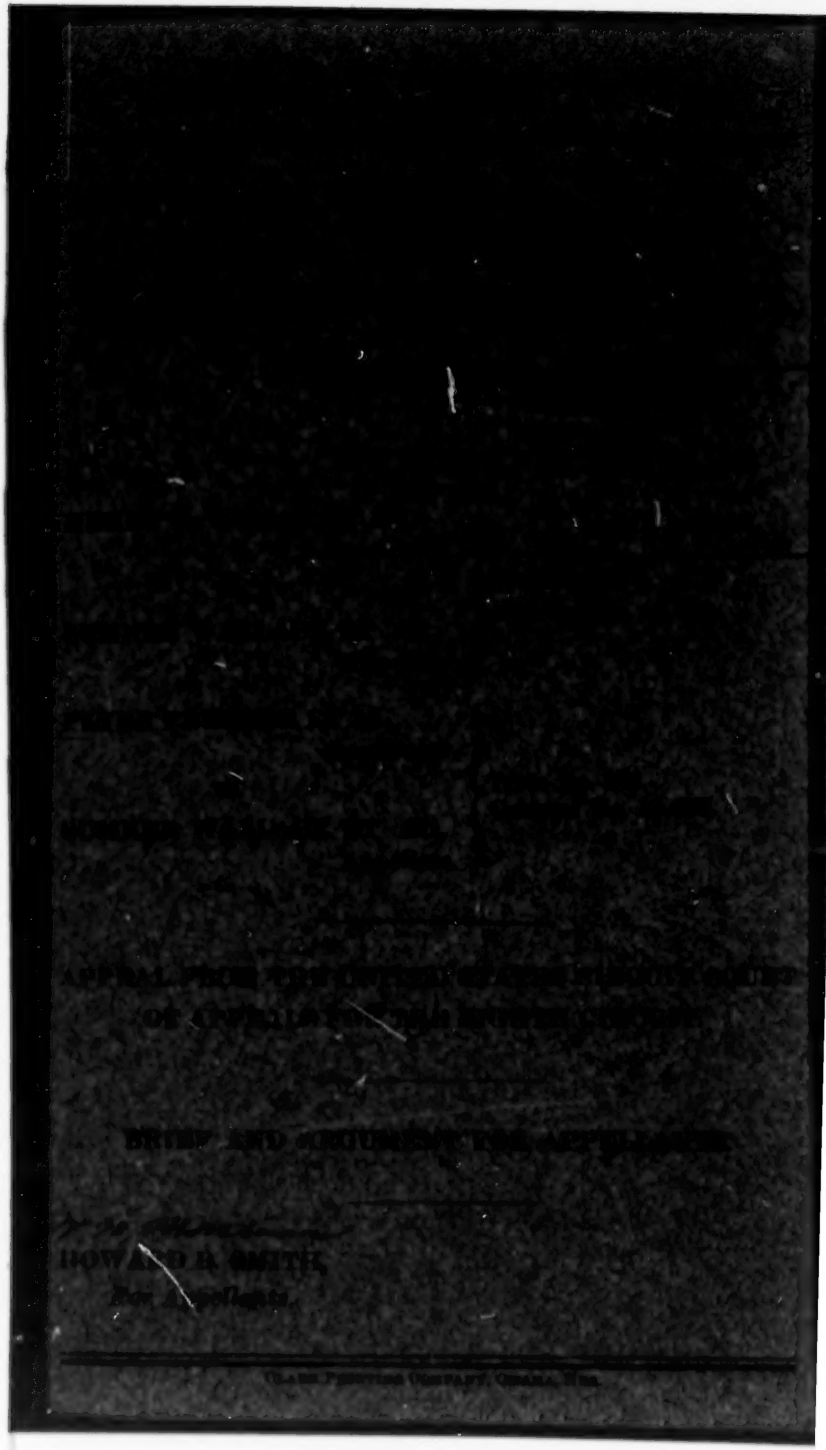
I do further certify that the original citations, on each of the above named appeals to the Supreme Court of the United States, with the returns of service endorsed thereon, are hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of said circuit court of appeals, at office in the city of St. Louis, Missouri, in the eighth circuit, this twenty-fourth day of February, A. D. 1905.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals
for the Eighth Circuit.

Endorsed on cover: File No. 19,652. U. S. circuit court appeals, 8th circuit. Term No. 191. Henry F. Wyman and Morris Levy, appellants, *vs.* Sumner Wallace and Union National Bank of Omaha, Nebraska. File No. 19,653. Term No. 192. Peter Frenzer, Howard B. Smith and George G. Wallace, appellants, *vs.* Sumner Wallace *et al.* File No. 19,654. Term No. 193. Edgar M. Morsman, appellant, *vs.* Sumner Wallace *et al.* File No. 19,655. Term No. 194. William S. Poppleton, appellant, *vs.* Sumner Wallace *et al.* File No. 19,656. Term No. 195. George W. McClellan, as executor of the last will & testament of Robert H. McClellan, deceased, *et al.*, appellants, *vs.* Sumner Wallace *et al.* Filed March 13th, 1905. File Nos. 19,652–'3–'4–'5 & '6.



Supreme Court of the United States

HENRY F. WYMAN ET AL.,
Appellants,
vs.
SUMNER WALLACE ET AL.,
Appellees.
Term No. 191.
General No. 19,652.

PETER FRENZER ET AL.,
Appellants,
vs.
SUMNER WALLACE ET AL.,
Appellees.
Term No. 192.
General No. 19,653.

BRIEF AND ARGUMENT FOR APPELLANTS.

The appellants in the above entitled cases were shareholders in the American National Bank of Omaha and were, with other shareholders, held liable for the balance remaining unpaid upon three notes executed and delivered in the name of the American National to the Union National Bank of Omaha, in and by a decree of the Circuit Court in and for the District of Nebraska, and that decree was affirmed by the Circuit Court of Appeals, Eighth Circuit.

It will save time and prevent repetition to consider the two appeals in one brief.

STATEMENT OF FACTS.

The American National Bank and the Union National Bank had for several years prior to December 21, 1895, been engaged in business in Omaha, Nebraska; the former at the

northwest corner of Fifteenth and Dodge streets, and the latter at the southeast corner of Sixteenth and Dodge streets. They were by reason of their very proximity, competitors for business. Mr. Baird, one of the complainant's witnesses (there were no witnesses called by defendants), testified that he became a director of the American in the fall of 1893 (Record, p. 143) and that the American had never from that time down to December 21, 1895, failed to pay all demands made upon it. (Pp. 157-158.) On that day, the business and assests of the American were sold (Exhibit 7, p. 255) to the Union and the three notes in controversy herein executed and delivered to it. As an excuse for that transaction, it is now claimed by those who carried it out, that immediately prior to December 21, 1895, it appeared that certain public officers, to-wit: state, county and city treasurers, might soon withdraw their deposits, and that such withdrawals might embarrass the bank. (Mr. Baird, p. 144.) But the evidence is not satisfactory and must leave in the mind of a disinterested reader the clear impression that the real and underlying reason for such action has not been given or that, at least, all the reasons have not been given. However that may be, there was no meeting of the Board of Directors of the American called to provide for such possible withdrawals (Mr. Baird, p. 146), but negotiations were entered into by Mr. Minot of Boston and Mr. Baird of Omaha with certain officers of the Union. (Mr. Baird, p. 146.) Mr. Minot was not a shareholder in the American, but was a creditor of the American, holding a note for $7,000.00, which was paid by the Union on December 28, 1895 (Mr. Raney, p. 183)—a week after the transaction. He also represented the National Bank Building Company, which was a shareholder in the American (Mr. Baird, p. 145) and was the owner of the building in which the American had its office. Mr. Baird, although a director of the American, acted as Mr. Minot's attorney. (Mr.

Baird, p. 145.) When Messrs. Minot and Baird had come to a verbal understanding with the officers of the Union, the directors of the American were immediately called together (Mr. Baird, p. 146), and an agreement was drafted by Mr. Baird. (Mr. Baird, p. 158 and Exhibit 1, p. 250). That agreement was then approved by the directors of the American (Exhibit 7, p. 255) and was signed by the presidents and cashiers of the two banks. All this was done on Saturday, December 21, 1895 --the agreement being signed at 8 o'clock in the evening of that day. (Mr. Baird, p. 147.) The Agreement is marked "Exhibit 1" and appears on page 250 of the Record, and a copy is hereto attached in an appendix as Exhibit A. But before the Agreement was signed and on Saturday afternoon, the clerks of the Union went over to the office of the American and commenced to work on the books and were engaged in that work and in moving the books, etc., of the Union to the office of the American most of Sunday. (Mr. Rainey, pp. 184-191; Mr. Baird, p. 155.) On Monday, December 23, 1895, without waiting to determine the exact balance for which notes should be executed and delivered by the American to the Union as required by the "Third" provision of the Agreement (p. 251), Mr. Wattles, then vice president of the Union, says, (pp. 238 and 239) that the officers of the two banks *estimated* the probable amount of the assets of the American to be taken by the Union as cash, at $39,000.00 or $40,000.00, and, pending the determination of the exact amount, the president and cashier of the American executed and delivered in the name of the American to the Union three non-negotiable notes for $67,000.00, with interest at 6 per cent per annum from that day, payable quarterly, and due in one, two and three years from date, respectively, *and* a cashier's check for $39,000.00 or $40,000.00. Mr. Rainey's figures show this to have been $39,929.51 (pp. 192 and 194) and so does the amended bill (p. 22.) A week or ten

days after, the Union decided not to take $39,929.51 of the assets of the American as cash, but to take only about $22,000.00; and the first cashier's check was taken up and another issued for $17,000.00, and this was afterwards paid out of the assets of the American. (Mr. Wattles, pp. 238 and 239.) Under the terms of the Agreement, this $17,000.00 should have been divided by three and the amount thus fixed should have been added to each of the three notes.

On Monday, December 23, 1895, all the assets of the American were turned over to the Union and to Kimball, trustee, for liquidation. (Mr. Wyman, pp. 170 and 174.) The accounts of the depositors in the American had been entered upon the books of the Union on Sunday, and when the doors opened on Monday, the Union was in possession of the banking room of the American, and in a position to induce its former customers to continue their business with it. At least 200 out of the 400 did so (Mr. Rainey, pp. 184, 194). Incidentally, Mr. Minot promptly drew his $7,000.00, and Messrs. Kimball, president of the American, and Dufrene, a director of the American, became directors of and, of course, shareholders in the Union (Mr. Baird, p. 155 and Exhibit 29, p. 279), and remained such at least down to April 28, 1898.

It seems, however, to have been the opinion of all those who took part in the transaction, whether interested in the American or the Union, that the assets of the American were more than sufficient to meet all obligations of the American. (Mr. Baird, pp. 151, 152; Mr. Wyman, p. 175; Mr. Wattles, p. 240.) But the American had come to an abrupt end, and to all its shareholders, except the officers, an unexpected end. With its doors closed , its business and office in the actual possession of a rival bank, and its assets in the control of the Union and Mr. Kimball, there was nothing—absolutely nothing —which could be done by its shareholders.

Without stopping now to analyze the terms of the Agreement thus consummated, in order to determine its precise meaning, it can be said without fear of contradiction, that the general result was that the Union secured the location, the good-will, the office furniture and fixtures, and absolutely or conditionally all the assests of the American of every name and nature, while it also held three non-negotiable notes of the American aggregating $201,000.00.

On the other hand, the American was relieved of its liabilities "to its depositors and on account of its bills payable," but had *no assets* remaining; while it had still outstanding said three notes aggregating $201,000.00, *and such liabilities* as were not due its depositors or were not of the nature of "bills payable," *and had assumed other liabilities entirely new*, which will be described later.

On February 25, 1896, at a special meeting of shareholders of the American, more than two-thirds of the capital stock voted that the American be placed in voluntary liquidation (Exhibit 14, p. 26), and, without going into details, it appears, so far at least as the writer of this brief is advised, that all the *formal* requirements of the United States banking laws in that regard were complied with in the name of the American.

On January 6, 1898, the directors of the Union (Exhibit 29, p. 279), voted "that said notes be assigned to Sumner Wallace (the complainant) in order that proper legal proceedings may be undertaken in his name to forward the mutual interests of *this* bank and Thomas L. Kimball, trustee, representing such subscribers," i. e., a proposed syndicate of certain of the shareholders of the American (par. 3 of Exhibit 29, p. 279). And, strange to say, among the directors thus voting was Mr. Dufrene, who was formerly (on December 21, 1895), a director of the American, and Mr. Kimball, who was formerly president of the American, and was at that time (January 6, 1898), the

trustee named in the Agreement between the American and Union, and *as such trustee engaged in managing and collecting its assets.*

On August 8, 1898, the directors of the Union (Exhibit 27, p. 278), authorized the assignment of one of the three notes to said Sumner Wallace.

On August 18, 1898, a bill of complaint was filed in the United States Circuit Court for the District of Nebraska against the American, the Union, Thomas L. Kimball, trustee named in the Agreement, and the shareholders of the American.

Succinctly stated, complainant alleges that he is a resident and citizen of the state of New Hampshire, and these appellants of Nebraska, and that the other defendants are residents and citizens of the various states named (p. 2); that the American executed and delivered the $67,000.00 note first due (p. 3); that he is the legal owner and holder thereof by an assignment without recourse (p. 3); that there is due thereon from the American and its shareholders $41,179.76 (p. 4); that the American delivered to Thomas L. Kimball, as trustee, "certain notes and property as security to the notes sued on herein, and other notes given to the said Union National Bank" (p. 4); that Kimball "is made a party hereto in order that he may make a full and complete statement" preliminary to a sale thereof (p. 4); that the American went into voluntary liquidation on January 14, 1896 (p. 5); that the capital stock of the American is $200,000.00, and the defendant shareholders own the amount of shares set opposite their names (p. 5); that *at the time* the American went into voluntary liquidation it was and still is insolvent (p. 7); that this action is brought on behalf of himself and all other creditors. (P. 7.)

The prayer of the bill is that the amount due complainant upon his note may be determined; that it may be ascertained "who the creditors of the said American National Bank are,"

and the amounts due them; that judgments may be entered against the bank and its shareholders; that Thomas Kimball, trustee, be required to report and the securities in his hand sold and applied "toward the payment of the indebtedness so secured, as by law and the *agreement* of said parties they should" be. The Agreement is not not set out or pleaded.

The American demurred, and on September 29, 1899, its demurrer was sustained *for want of jurisdiction*, the Court below saying (p. 11), "jurisdiction of this Court can not be sustained for the reason that it (the suit) does not arise under any law of the United States, and the citizenship of the parties is not such as to give this Court jurisdiction, plaintiff being the assignee of a mere chose in action, its assignor, the Union National Bank, being a citizen of the same state as the American National Bank."

Notwithstanding this, the Circuit Court, on January 8, 1900, said Kimball having died, appointed one James Burness as his successor (p. 18), with the power and authority possessed *by said Kimball under said Agreement.*

On February 17, 1900, (p. 18), complainant filed his amended bill of complaint and refiled the same (pp. 33 and 34), on January 8, 1901.

In this he alleges that negotiations were had between the officers and agents of the American and Union and that such negotiations resulted in the written agreement attached thereto (and hereinbefore referred to), the transfer of the business of the American (p. 21), the assumption of liabilities by the Union, the execution and delivery of the three notes of the American (hereinbefore described), for $201,000.00 (p. 22), and the turning over of the American's assets to Thomas L. Kimball, as trustee under the agreement. (p. 23.) He further alleges that the note first falling was assigned to him without recourse (p, 23), and that $.....is due and owing

him thereon (p. 24); that the Union still holds the other two notes and is a creditor of the American (p. 24); that the defendants were advised of the negotiations and of the condition of the American and have received the benefits of the transaction (pp. 24 and 25); that the assets so turned over to Kimball are now held by Burness (p. 25); that the American went into voluntary liquidation on January 14, 1896, (p. 25); that its capital stock was $200,000.00 (p. 26); that the defendants hold stock in the various amounts set opposite their names (p. 26) and are liable to the amount thereof (p. 28); and "that by *reason of* the voluntary liquidation of the said bank as hereinbefore set forth and the insolvency of said bank, and its inability to meet its obligations, this action is brought against the said American National Bank and its stockholders jointly under and through the authority granted by the laws of the United States *relating to banking.*" (P. 28).

The prayer of the amended bill is similar to the prayer of the bill, except that the amended bill prays (p. 30) that James Burness, as trustee, make report of all the assets of the American "still in his hands and held as security for the claim of your orator and any other (the Union) of the creditors of said bank and to be and abide the order of the court herein as may be equitable and of good conscience to the further end that this honorable court may make due and proper assessment upon the stock and stockholders of said bank as hereinbefore prayed."

On February 4, 1901, the defendants, Peter Frenzer and four others, filed a joint and several answer. In this, they deny that prior to December, 1895, there were conferences with respect to the taking over of the business and office fixtures of the American by the Union and deny that in December, 1895, the American was in such financial condition as to require provision for the payment of a large amount on or about January 1,

1896, and deny it did not have sufficient funds to meet such demands (p. 59); allege that the amount of available cash and cash items then on hand was $49,000.00 instead of $36,970.78 (p. 59); say that they had been informed and believe that negotiations were entered into in December, 1895, which resulted in the affixing of the name of the American to the agreement set out in the amended bill, the transfer of the business of the American to the Union, the assumption of the American liabilities "to its depositors and an account of its bills payable," but deny the payment thereof by the Union (pp. 59 and 60); and deny that the liabilities assumed in excess of the amount accepted as cash amounted to $201,000.00. (P. 61)

They further deny that *the American* executed and delivered the three notes mentioned in the bill, but allege this to have been the act of its officers; and allege that the assets of the American were turned over to the Union (not to Kimball) to liquidate the same (pp. 61 and 62), deny the note first maturing was assigned to complainant (p. 61), or that any sum is due him or the Union (p. 62), or that they are creditors of the American. (P. 64.)

They further say that it is not true and they deny that either of them was advised of the negotiations or their purpose and design, or acquiesced in and consented thereto (p. 63), or was advised of the alleged condition of the American or accepted and received any of the benefits of such contract or ratified and affirmed the same or permitted and induced the Union to pay out any money. (Pp. 62 and 63.)

They deny that the American went into voluntary liquidation (p. 63); admit the holding of certain shares of stock in the American (p. 64); deny that this action is brought under the authority granted by the laws of the United States relating to banking; aver that their liability as shareholders is limited to the *valid* contracts, debts and engagements *duly* entered into

by the American *in the usual and ordinary course of the business of banking;* and deny that "they are liable for the payment of the claim of the plaintiff and of the claim of the said Union National Bank to the amount of stock so held by said defendants or to any other amount or to any extent whatsoever."

They then set out the resolution of the Board of Directors of the American, passed December 21, 1895, (p. 65-68), the execution by Thomas L. Kimball of the Agreement (p. 68). the turning over of the assets of the American to the Union (p. 68.), the removal of the Union to the office of the American and the taking of its office fixtures (p.69), the execution and delivery of the three notes by Kimball in the name of the American (p. 69), the existence *of other creditors* of the American (p. 69), and thus continue (p. 70):

> "The said meeting of the Board of Directors, on December 21, 1895, was held and said resolution adopted at such meeting and said agreement signed and delivered, and said assets delivered, and said notes signed and delivered *without the knowledge or consent* of these defendants, or either of them.
>
> "And these defendants further, severally answering, say, that no proceedings have been had at law upon the three notes above mentioned, or either of them, and that said plaintiff has not reduced his said claim founded upon the note set out in his amended bill *to judgment* in any court."

The joint and several answer of appellants in No. 19,652, Henry F. Wyman and three others, (p. 46), was filed February 4, 1901, but was so nearly like the answer of Peter Frenzer, et al., that it does not seem necessary to summarize it. We mention differences later.

To these two answers and, indeed, to all the answers of all answering defendants, the complainant filed one general replication on August 2, 1901. (P. 121.)

On August 2, 1901, the Union filed an answer alleging

that it held the two notes before mentioned (p. 118); "that no part of said notes has been paid except the interest on each of said notes has been paid to March 23, 1897;" that it (p. 120) claims "all of the benefits arising and accruing from and by virtue of said agreement." *No process* was issued upon this answer and *no notice* to appellants given.

On July 1, 1902, the complainant pressing for a hearing, the cause was argued to the Circuit Court and submitted on the proofs and taken under advisement. (P. 122.)

On September 1, 1902, the court concluded that the assets of the American must be disposed of before the question of the individual liability of the shareholders could be adjudicated (p. 123), and ordered the same to be done by James Burness, who had been appointed to succeed Kimball *as trustee named in the Agreement*. Burness sold the same to the Union and his action was confirmed on December 9, 1902. (P. 123.)

On January 3, 1903, the final report of the trustee was approved, except with respect to a portion of the fees charged by the trustee, and these were disallowed because he had been in the employ of the Union while acting as trustee.

On April 24, 1903, a "Memorandum Opinion" upon the merits of the cause was filed and appears at page 126 of the printed record and will be hereinafter more particularly referred to.

On the 23rd day of May, 1903, a decree (Record, p. 130) was entered in accordance with the Memorandum Opinion, finding the balance due complainant upon his note to be $46,524.83, the balance due the Union upon its two notes to be $147,941.52, and the amount due upon each $100 share of the stock held by the several defendants to be $97.23; and adjudging that complainant and the Union have and recover from the American and from each of its shareholders the amounts respectively due them upon this basis.

The amounts adjudged due complainants and the Union respectively were as follows, to-wit: From Henry Wyman $1,354.89 and $4,308.75; from Morris Levy $1,163.00 and $3,698.50; from Peter Frenzer $348.90 and $1,109.55; from Howard R. Smith $1,163.00 and $3,698.50; and from George G. Wallace $1,744.50 and $5,547.75.

Thereupon petitions for appeal (p. 314) and assignments of error (p. 316) were filed, the appeals were duly allowed by the court (p. 323), bonds were given and duly approved by the court (pp. 324-336), a præcipe for a transcript (p. 340) of the record was served and filed on June 12, 1903, and the record was filed in the Circuit Court of Appeals on July 20, 1903.

The decree of the Circuit Court was affirmed by the Circuit Court of Appeals on December 8, 1904 (pp. 390, 400, 410) and these appellants severally prayed an appeal (pp. 401, 411) and asigned errors (pp. 403, 412), and their appeals were allowed on February 6, 1905, (pp. 408, 420), and the record duly filed in this court on March 13, 1905.

The following errors were assigned and are now relied upon to-wit:

ASSIGNMENT AND SPECIFICATION OF ERRORS.

1. That the Circuit Court of Appeals erred in its decree in holding it was not essential to the maintenance of the suit in the court below (to-wit: in the said Circuit Court for the District of Nebraska) that the complainant (Sumner Waliace) should have first reduced his demand to judgment.

2. That the Circuit Court of Appeals erred in its decree affirming the decree and judgment of the Circuit Court for the District of Nebraska; that is to say, in holding that the suit is one to wind up the affairs of a national bank and a suit arising under the laws of the United States of which the Circuit Court had jurisdiction.

3. That the Circuit Court of Appeals erred in its interpretation of the contract of December 21, 1895, between the American National Bank and the Union National Bank, and in holding the same to be merely a contract by which "the Union National Bank assumed the payment of the liabilities of the American National to its depositors and on account of bills payable, and in return was to receive its cash, cash items and such bills receivable as the former was willing to accept at par and without recourse. The difference between the aggregate of amounts so received, and the gross amount of liabilities assumed was to be represented by three non-negotiable promissory notes of the American National, the payment of which was to be secured by the pledge of all its remaining assets to Thomas L. Kimball as trustee," which erroneous interpretation was material to the final conclusion of the Court.

4. That the Circuit Court of Appeals erred in holding that the contract of December 21, 1895, between the American National Bank and the Union National Bank, had been ratified by the shareholders of the American National Bank, and that the individual liability of the shareholders under section 5151 of the Revised Statutes of the United States might, therefore, be enforced.

5. That the Circuit Court of Appeals erred in holding that the compainant, Sumner Wallace, and the Union National Bank could go behind the contract of December 21, 1895, and that their claims were, in equity for the "contracts, debts and engagements," of the American National Bank, for which shareholders are made individually liable, under section 5151 of the Revised Statutes.

Upon the the pleadings and proofs there are four broad questions for solution in this cause, to-wit:

1. Had the United States Circuit Court for the District

of Nebraska jurisdiction by reason either of the nature of the cause of action or of the citizenship of the parties?

2. Was the nature of the transaction between the officers of the American and the Union such that the American is not liable for any deficit unpaid upon either of the three notes issued in its name by such officers? If it is not liable, of course, these appellants are not liable.

3. Was that transaction of such a nature that these appellants as shareholders of the American are not liable for that deficit, even though the bank itself may be?

4. If the shareholders of the American are for any reason not liable *at law* for such deficit, are these appellants liable therefore *in equity* for the reason that they had acquiesced in or ratified such action?

BRIEF.

I.

The Circuit Court of the United States did not have and should not have assumed jurisdiction to try this cause and render a decree against these appellants.

A.

The Court did not have jurisdiction on the ground of citizenship, because complainant is the assignee of a non-negotiable chose in action and his assignor, the Union National, is a bank located in the state of Nebraska, while the American National, Kimball and these appellants were also citizens of the state of Nebraska.

Wilson vs. Knox Co., 43 Fed. 481.

Parker v. Armsby, 141 U. S. 81 (1891.)

Mexican Nat. R. R. Co. v. Davidson, 157 U. S. 201, (1895.)

Cloud v. City of Sumas, 32 Fed. Rep. 177 (1892.)

B.

The Court did not have jurisdiction under section 2 of the Act of June 30, 1876.

1. Because the American did not go into voluntary liquidation within the meaning and purpose of the United States banking laws.

2. Because complainant has not filed "a bill in the nature of a creditors' bill" as required by said section.

3. Because the American National and its shareholders have been denied the right to have the validity of the note sued on determined in the proper Court before a jury, as provided by the Seventh Amendment to the Constitution of the United States and by Section VI of Article 1 of the Constitution of Nebraska.

4. Because the bringing of an action by any one not a judgment creditor conflicts with the provisions of the United States banking laws under which there are only two methods of liquidating the affairs of a national bank—one by the Comptroller and the other under Section 5220.

5. Because the failure of Congress to provide in Section 2 that a national bank should be made a party defendant, indicates that the action in said section was intended to be simply ancillary to a prior proceeding at law.

6. Because the complainant did not and could not, owing to the peculiar nature of the case, bring an action in behalf "of the other creditors of the Association."

C.

The Court did not have jurisdiction under Section 1 of the Act of March 3, 1887, as corrected by the Act of August 13, 1888, because the bill did not present a suit "arising under the laws of the United States."

D.

The Court did not have jurisdiction under Section 4 of the Act of March 3, 1887 as corrected by the Act of August 13, 1888, for the following reasons:

1. An action to wind up the affairs of a national bank must be brought by an "officer" or "agent" of the United States.

2. This action was not in fact one to wind up the affairs of a national bank; and

3. The bill did not state facts sufficient to sustain this action as one to wind up the affairs of the American National.

II.

The American National was not obligated to make good any deficiency remaining after the exhaustion of its assets in the hands of the Union National and Kimball, and hence appellants were not liable therefor as shareholders.

The Circuit Court (but not the Court of Appeals) proceeded upon the theory that the borrowing of money is one of the incidents in the ordinary course of the business of banking, and that there was a simple borrowing of money by the American from the Union. But an analysis of the cases in the Federal Courts involving the power of national banks to borrow money show these facts; (1) that the moneys were loaned by banks in good faith in the usual course of the business of banking; (2) that the moneys were borrowed in the usual course of the business of banking; (3) that the moneys so borrowed were actually paid out by the borrowing bank in the usual course of the business of banking, or if not actually so paid out, then the loaning banks had no knowledge of the diversion thereof and were not parties thereto. And those cases establish these two propositions: (1) that the power to borrow money is an incidental power and is limited to occasions when borrowing is "necessary to carry on the business of banking"; and (2) that

all borrowing must be of a temporary nature.

The cases so analyzed are the following:

First Nat. Bank v. Nat. Exch. Bank, 92 U. S. 122 (1876.)

Western Nat. Bank v. Armstrong, 152 U. S. 346, 351, (1894)

U. S. Nat. Bank v. First Nat.-Bank, 27 U. S. App. 605 (1894) and 49 U. S. App 67 (1897.)

Auten vs. U. S. Nat. Bank, v74 U. S. 125 (1899).

Stapleton v. Stockton, 91 Fed. 326 (1899.)

Ditty v. Dominion Nat .Bank, 75 Fed. 769 (1896.)

Aldrich v. Chemical Nat. Bank, 176 U. S. 618 (1900.)

But the situation of the two banks and the nature of the transaction and the natural and inevitable results of the transaction were such as to show that the transaction *in toto* was not a simple borrowing of money but was not only (1) beyond the powers of the Board of Directors acting alone, but (2) ultra vires the American National itself.

1. For directors have no power to perform acts not within the ordinary business of the corporation.

Chicago City Ry. Co. v. Allerton, 85 U. S. 233 (1874.)

If, as held in *Roberts v. Hill,* 24 Fed. 571 (1885), a national bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will *presently* be unable to meet its obligations, the Comptroller should have been notified and the shareholders of the bank would, under Section 5205, have then been by him given the option either to continue the business of the bank by making good its capital stock, or to submit to liquidation under the supervision of the Comptroller.

If, on the other hand, (*Case vs. Citizens Bank,* 2 Woods, 23, 1878), a bank is insolvent only when it is unable to meet the

demands *actually* made upon it, then the circumtances did not authorize tht directors to take the action they did; and the condition of the American was well known to the officers of the Union.

2. Corporations (including national banks) have such powers and such powers only as are expressly or impliedly conferred upon them, and any act which is not within the powers so conferred is impliedly prohibited.

Germania, etc Co. vs. Boynton, 71 Fed. 797, 801 (1896); 37 U. S. App. 602.

Central Trans. Co. vs. P. P. C. Co., 139 U. S. 24 (1890).

Cal. Nat. Bank vs. Kennedy, 167 U. S. 362, 366 (1897).

1. The power to enter into this transaction, if existing, must be an incidental power, as it is not expressly conferred.

2. The incidental powers of national banks are defined and limited in and by Section 5136 U. S. Revised Statutes and do not authorize a transaction such as the one between the banks.

3. The power to enter into such a transaction is impliedly denied by the general trend of the laws governing national banks and the object such laws have in view.

4. The power to enter into such a transaction is impliedly prohibited by the following provisions of the banking laws of the United States, to-wit: Sections 5145 and 5147, 5133, 5137, 5202, 5222, 5230, 5153 and 5497, and 5146.

5. The power to enter into such a transaction is expressly prohibted by Section 5242.

National banks are public corporations and the banking laws governing them are complete in themselves, provide expressly when and by whom a bank shall be liquidated, and exclude all other methods.

National Bank vs. U. S., 107 U. S. 445 (1883).
In re Mfgrs. Nat. Bank, 5 Biss, 499 (1873.)
First Nat. Bank vs. Colby, 88 U. S. 609 (1875.)
Hunt vs. American, etc., Co., 81 Fed. Rep. 532 (1897.)
Bank Commissioners vs. The Bank of Brest, 1 Harr. Ch. (Mich.) 106-111-112.

Assuming, *arguendo*, that the transaction in the case at bar is one where a contract had been executed on one side only, the Supreme Court holds that the fact a contract had been executed by one party and the other party has received the benefit thereof, does not give the contract validity, and further holds that no action will lie on the contract and that stockholders of a bank may show the nature of the transaction, i. e., that it was not such as to impose any liability upon them.

Pearce vs. Madison, etc., 66 U. S. 441 (1859).
Central Trans. Co. vs. P. P. C. Co., 139 U. S. 24 (1891).
Louisville, etc. vs. Louisville, etc., 174 U. S. 552, 567 (1899).
O'Brien vs. Whelock, 184 U. S. 450, 490 (1902).
Whitman vs. Nat Bank, 176 U. S. 559 (1900).
Ward vs. Joslin, 186 U. S. 142 (1902).

III.

The liability of shareholders in national banks is a restricted liability and the transaction between the banks was of such a nature that appellants are not liable for any deficit arising therefrom.

Section 5151 U. S. Revised Statutes is the only provision imposing liability upon shareholders of national banks; and the following cases show, (1) that the liability imposed upon shareholders by Section 5151 is a means of securing the pay-

ment of a bank's debts *at the time* when it is no longer able to continue business; (2) that the purpose of the section is to secure the *effectual winding up* of the bank's affairs; (3) that such liability cannot be *prolonged;* and (4) that there can be no liability on the part of shareholders *unless* the contracts, debts and engagements of the bank have been contracted (a) duly, and (b) in the ordinary course of the business of banking. They further show that the fact, that the new obligation *takes the place* of an old obligation for which the shareholders may have been liable, does not make them liable for such new obligation.

Richmond vs. Irons, 121 U. S. 27 (1887).
Schrader vs. Mfgrs. Nat. Bank, 133 U. S. 67 (1890).
Ward vs. Joslin, 186 U. S. 142, 152 (1902).

The "business of banking" is defined in *Mercantile Nat. Bank,* 121 U. S. 138 (1887), and the transaction between the two banks does not fall under that definition.

But the debt represented by the note sued on was not duly contracted because the transaction was *ultra vires* not only the Board of Directors but the bank itself, and because the debt was not incurred in the ordinary course of the business of banking, and because the transaction was such as to increase and prolong the liability of the shareholders as it existed on Dec. 21-23, 1895.

Such a transaction and the debt arising therefrom cannot be said to have been within the "legal contemplation" of the shareholders of the American at the time they purchased the shares held by them.

IV.

That appellants have not done anything to estop them to deny their liability to make good the balance remaining unpaid upon the notes.

Assuming, *arguendo*, that a contract *ultra vires* a corporation *can* be rendered enforceable against its shareholders by the principle of estoppel, we contend,

1. Ratification by implication is founded upon estoppel and the doctrines of estoppel can be applied only to persons individually, not en masse. No official action was taken by the shareholders in meeting assembled and none of these appellants did or failed to do anything from which ratification could be implied. Their silence could not affect their rights, as the duty to speak was not imposed on them. Nor would protest or action have benefited either them or the Union. They received no benefits from the transaction but if they had, the benefits were not the result of their desire or their action.

2. There was no express ratification such as could give validity to the original transaction, because the shareholders signed Exhibit 25 individually. Nor does that paper, which was signed by some shareholders only, impose any new contractual liability upon them. Nor does it estop them, because it was not intended to do so and was not an inducement to the Union to change its position.

Scovil vs. Thaer, 105 U. S. 143 (1882).
Thomas vs. West Jersey R. R. Co., 101 U. S. 71 (1880).
Bloomfield vs. Charter Oak Nat. Bank, 121 U. S. 121, 135 (1887).
Mutual Life Ins. Co. vs. Mowry, 96 U. S. 544, 547 (1878).

But a contract *ultra vires* a corporation *cannot* be rendered enforceable against its shareholders by ratification or by estoppel.

Central Trans. Co. vs. P. P. C. Co., 139 U. S. 24 (1891).
Cal. Nat. Bank vs. Kennedy, 167 U. S. 362 (1897).
First Nat. Bank vs. Conrad, 174 U. S. 364, 372 (1889).

Ward vs. Joslin, 186 U. S. 142, 151 (1902).

To hold that the notes represented contracts, debts and engagements of the American for which its shareholders were liable and that for that reason the Union should recover against appellants, would be to overrule in effect the cases cited last above. Again, such a conclusion

1. Is not based upon any averment in the bill or the amended bill.

2. Is opposed to *Richmond vs. Irons, Schrader vs. Mfrgs. Nat. Bank* and *Ward vs. Joslin, ante.*

3. Would deprive the shareholders of their right to contest their liability for such claims.

The transaction was an entirely new deal and the Union was under no prior oblibation to pay the debts of the American and was a volunteer.

Aetna Life Ins. Co. vs. Middleport, 124 U. S. 548 (1888).

ARGUMENT.

I.

THAT THE CIRCUIT COURT OF THE UNITED STATES DID NOT HAVE AND SHOULD NOT HAVE ASSUMED JURISDICTION TO TRY THIS CASE AND ENTER A DECREE AGAINST THESE APPELLANTS.

A.

Complainant is the assignee of a non-negotiable *chose in action* and his assignor (the Union National) is a bank located in the state of Nebraska. Therefore, his citizenship is of that state, and the American and Kimball (Trustee under the Agreement) and these appellants are also citizens of that state. If, then, complainant had appealed to the *general* equity jurisdic-

tion of the United States Circuit Court, he would have failed because that court had no jurisdiction.

Wilson vs. Knox Co., 43 Fed. 481, opinion by Miller, Justice, and Caldwell, Judge; *Parker vs. Armby*, 141 U. S. 81 (1891); *Mexican Nat. R. R. Co. vs. Davidson*, 157 U. S. 201 (1895); *Cloud vs. City of Sumas*, 52 Fed. Rep. 177 (1892).

B.

The allegations of the original bill (Record, p. 7) and of the amended bill (p. 28) and the two opinions of the Circuit Court (p. 12 and p. 126) show that the right of that Court to assume jurisdiction was based by that court and by complainant *solely* upon Section 2 of the Act of Congress of June 30, 1876 (Supp. U. S. Rev. Stats., 217). The opinion of the Court of Appeals bases it upon this ground and also (Record, p. 395), upon the Act of August 13, 1888—which Act we consider later.

Section 2 of the Act of June 30, 1876 (assuming for the present that said section has not been repealed and is still in full force) provides as follows:

> "That *when* any national banking association shall have gone into *voluntary liquidation* under the provisions of section fifty-two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-two hundred and fifty-one of said statute may be enforced by any creditor of such association by bill in equity *in the nature of a creditors'* bill, brought by such creditor in behalf of himself *and all of the other creditors* of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

It is a familiar rule that one who seeks the benefit of a particular statute must show himself and his cause of action to be strictly within the terms thereof. This has not been done by complainant.

1. The American did not go into volutary liquidation within the meaning and purpose of the United States banking laws. The word "liquidation," used in said Sec. 2 and in Sec. 5220, Rev. Stats., has a definite meaning and *presupposes* the existence of assets to be liquidated in the manner provided. But there remained under the control of the American or of its directors nothing to liquidate. *All* the assets of the American had been turned over to the Union and Kimball, for them to collect and apply to the payment of the three notes, and they had proceeded to do this and were *still engaged in the process of liquidation* at the time the vote was taken

2. Again, the complainant has not filed "a bill in the nature of a creditor's bill," as positively required by said Sec. 2; for neither of his bills allege and his proof does not show, any action at law upon his note. But a creditors' bill presupposes two things; (1), that the creditor has been able to establish his claim to be a valid and honest claim before the proper court at law; and (2), that he needs the assistance of a court of equity in order to realize upon it. This is illustrated by *Jones vs. Green*, 68 U. S. 330 (1883), and *Smith vs. R. R. Co.*, 99 U. S. 398 (1878), and *Scott vs. Neely*, 140 U S. 106 (1891), and *Nat. Tube Works Co. vs Ballou*, 140 U. S. 517 (1892), and many other cases, including *Hollins vs. Brierfield C.* N *I. Co.*, 150 U. S. 371 (1893.) This is the latest expression of the Supreme Court and it therein reviews its former decisions (overruling some, distinguishing others, affirming others), and lays down the rule clearly and emphatically. Even if the fact that an execution would be fruitless, might be held to excuse the formal issuance of an execution in some instances, it would not excuse the failure to prove the validity of the claim in a court at law. Some courts execuse an execution, while insisting upon a judgment.

It is not a "creditors' Bill," unless there is a judgment

and, added thereto, the necessity (however this may be shown in evidence) of an appeal to equity to enforce it. It does not seem an answer in the particular case at bar to say, as the Court of Appeals apparently does in effect say, that because complainant has a lien and can go into *some* equity court of *general* jurisdiction without alleging a prior judgment and execution thereon, therefore he was entitled to relief in the Circuit Court below. For the Circuit Court has a strictly prescribed jurisdiction, and if complainant is to enter that court by the door of Section 2, he must comply with the terms of Sec. 2. The question seems simply to be, What did Congress *mean* by the words "Creditors' Bill"? And that section does not say, for instance, that any creditor may file a "bill in equity in the nature of a bill to foreclose a mortgage," or a "bill in equity in the nature of a bill to establish and declare a trust," or a "bill in equity in the nature of a bill to foreclose a lien," or a "bill the "nature of" anything else than a creditors' bill.

But complainant also argued and apparently the courts below (Record pp. 12 and 396) were of the opinion, that the words "any creditor," were the ruling words, and were not in any degree limited by the words "creditors' bill." But such construction would eliminate a portion of the section itself—which is contrary to the rule that all portions of an act of Congress must be given effect, if possible. For Sec. 2, thus interpreted, would read, "the individual liability of the shareholders * * * * may be enforced by any creditor (i. e., any person claiming to be a creditor) of such association by filing a bill in equity." But the words "in the nature of a creditors' bill" are a part of the section in fact, have a well defined meaning in law, and add an element otherwise wanting in the Act.

The construction for which we contend gives a meaning to all the words of the Act, conforms with the equitable remedies

and procedure existing at the time of its passage and deprives neither shareholders nor creditors of any rights or remedies.

But let us consider some other reasons why complainant's construction cannot be the correct one.

3. It has deprived the American and its shareholders of their right to have the validity of the note sued on determined in the proper court and before a jury. This right to a jury trial is preserved by the Seventh Amendment to the Constitution of the United States, and by Sec. VI of Art. I of the Constitution of Nebraska (which provides: "The right of trial by jury shall remain inviolate") and has been jealously guarded by the United States Supreme Court, as illustrated in *Cates vs. Allen*, 194 U. S. (1893), and *Scott vs. Neely*, 140 U. S. 106 (1891).

4. Complainant's contention is inconsistent with other provisions of the United States banking laws. Under the general banking laws of the United States there are only two methods of liquidating the affairs of a national bank and, as national banks are organized and operated under such laws, all persons dealing with them are bound to know, and are held conclusively to consent to, the conditions under which they do business and the statutory provisions under which their affairs will be liquidated.

One of these methods is for the Comptroller to appoint a receiver. The other method is under Sec. 5220 of the Revised Statutes, which provides that a bank may go into voluntary liquidation by the vote of its shareholders owning two-thirds of its stock.

The existence of a bank continues after it has gone into voluntary liquidation, *Central Nat. Bank vs. Conn. Mut. L. Ins. Co.*, 104 U. S. 54, 73 (1881), and *Chemical Nat. Bank vs. Hartford Deposit Co.*, 161 U. S. 1, 8 (1896)—and Sec. 5221 provides for the publication of a notice to creditors to present their claims to the bank. This provision is to enable the bank

to pay just claims without further expense. And the existence of the corporation is continued for the purpose of giving, on the one hand, creditors, the validity of whose claims are denied, access to a court of law, that they may there assert their claims; and of enabling on the other hand, a bank, which denies the validity of a claim presented against it, an opportunity to contest the same in a court of law.

But as the second means (to-wit: voluntary liquidation), might be abused through the dishonesty or incompetency of the bank's officials and the equal distribution of the assets among all creditors be delayed or evaded, Congress added the second section of said Act of 1876—the section under consideration. But Congress did not mean that any person *claiming to be a creditor* could *ipso facto deprive* the stockholders of their right to a voluntary liquidation under Section 5220 of the Statutes. Indeed, the assets of a national bank might be abundant and the Comptroller, after a thorough examination of the affairs of the bank, might determine that a voluntary liquidation under Sec. 5220 would be best not only for the stockholders but for the government and all creditors, yet (according to the theory of complainant) any person claiming to be a creditor, no matter how small might be the amount of his claim or how unjust might be his claim in fact, could force its assets into the hands of a receiver, force such assets to a speedy and ruinous liquidation and inflict, certainly upon its shareholders and perhap upon it creditors, great loss and unnecessary court costs and receiver's expenses. In order to prevent an action of this kind and in order to assure the court that the creditor's claim is a just one, Sec. 2 provides that the bill filed by him must be "in the nature of a creditors' bill;" that is, he must at least show that his claim has been adjudicated by some court of competent jurisdiction after due investigation.

It is very suggestive in this connection, that complainant's

counsel are *unable to cite a single case* in the reports where there has been an attempt to bring an action under said Sec. 2 by any one who had *not* secured a judgment at law against a bank and had had an execution issued and returned unsatisfied. See for instance, *Richmond vs. Irons, post.*

5. Again, as the assets of a national bank must be exhausted before the secondary liability of its shareholders can be enforced, it is remarkable that Congress did not provide in said section that a bank should be joined with its shareholders as a party defendant. That which a legislature does not say often shows its intention as clearly as that which it does say.

As Congress did not provide that a bank should be joined as a party defendant, it would be necessary that the court should have jurisdiction over the American under some other Act of Congress if it was made a defendant, and this it did not have.

6. Again, Section 2 provides that the action shall be "brought by *such* creditor (i. e., one who can file a bill "in the nature of a creditors' bill") on behalf of himself *and all other creditors of the association.*" But how can the complainant be said to file a bill *in behalf of other creditors,* when he claims in his bill to have a lien upon *all* the assets of the bank, asserts that these assets are in possession of his assignor for the purpose of liquidation but while still unliquidated and unappplied are *insufficient* to pay their combined liens, and prays that the proceeds thereof be applied *exclusively* toward the payment of his and his assignor's claim? And it is worthy of note in this connection that the contract of the Union, his assignor, was to assume *only* the liabilities of the American "to its depositors and on account of its bills payable" (Par. second, Exhibit 1, p. 250.)

7. Again, Section 5221 expressly provides *as a part of the procedure* of involuntary liquidation for notice to creditors,

"To present the notes and other claims against the Association for payment," and the unavoidable inference from this is, that it is the duty of creditors to present their claims. But neither the bill nor the amended bill allege such presentation of either of the three notes.

For these reasons, it would seem that Congress by the Act of June 30, 1876, did not intend to subvert the usual requirements of, and procedure in, the Courts of Equity of the United States, but did intend simply to open the doors of such courts to judgment creditors, who otherwise might have been debarred therefrom by reason of being citizens of the same state as the bank against which they sought the aid of a court of equity.

C AND D.

But the Circuit Court of Appeals said (Record, p. 395), "A broader and more satisfactory ground may be found in the provisions of the Act of August 13, 1888" upon which to support the jurisdiction of the Circuit Court, and held that complainant's cause of action arose under the laws of the United States and, also, that the action itself was one brought to wind up the affairs of a national bank.

The question whether Section 2 of the Act of June 30, 1876, had not been repealed by Section 6 of the Act of March 3, 1887, as corrected by the Act of August 13, 1888; and the question whether under Section 4 of the Act of August 13, 1888, the jurisdiction of Circuit Courts in "cases for winding up the affairs" of any national bank is not limited exclusively to suits commenced by "officers" or "agents" of the United States; and the question whether the bill presents a case "arising under the laws of the United States" have all been so carefully and ably presented in the brief filed by Mr. W. W. Morsman in *Morsman vs. Wallace et al.*, Trial No. 193, that it is unnecessary to discuss them further here.

But it may not be out of place to consider whether the Court of Appeals has not misconstrued the nature of this action in holding it to be one to "wind up" the affairs of the American. Was it in reality anything more than a suit to foreclose a lien and to secure a deficiency judgment against the American and also, incidently, against its shareholders? It would seem not; for there were in fact, and the bill so alleges, no assets in control of the American—no affairs to be wound up. But even had there been; has a simple contract creditor, whether possessing a lien or not, inherently any right to ask that the affairs of a bank organized under the laws of the United States shall be wound up for his benefit, and particularly has he such right before he has exhausted his lien *according to the terms of the contract creating it?*

In this connection and to further illustrate the peculiar nature of this suit, we desire to call attention to several matters, bearing in mind that the Court of Appeals bases the jurisdiction of the Circuit Court upon the right of complainant to bring an action "to wind up" the affairs of the American and considers his right to a judgment for deficiency against its shareholders merely as ancillary and incidental thereto.

In the first place, complainant, while alleging the American to have gone into voluntary liquidation under Sections 5220 and 5221, does not allege that its funds were being fraudulently diverted from the *cestuis que trustent.* In fact, the only ground upon which complainant could appeal to the general powers of a court of equity, was that he claimed a lien upon certain assets, which he wished to have sold under the authority of the Court. But his assignor had agreed (Record, p. 251), "to liquidate" those assets "without charge or expense" to the American "except such court charges and attorney's fees as may be found necessary." "To liquidate" meant to collect or sell, and apply the proceeds; and the court charges and at-

torney's fees were to be those incurred in doing that. But by this action the expenses of the liquidation since the filing of the bill have been imposed upon by the American and its shareholders. Again, complainant, while maintaining the validity of the Agreement between the banks and the authority of the Union and Kimball to dispose of the assets of the American and apply the proceeds thereof to the payment of the three notes (as of necessity complainant must do), does not allege that Kimball had not proceeded and was not then proceeding honestly, speedily and with excellent judgment to convert such assets into funds for the purpose of paying off such notes in accordance with the Agreement under which such notes were executed and such security delivered. There was no excuse for complainant calling for the assistance of a court of equity, unless he alleged that Kimball had been guilty of gross negligence or mismanagement, or had refused to dispose of the assets in his hands as such trustee and to apply the proceeds as the Agreement provided. Nor does complainant allege or prove that he has called upon Kimball, as trustee, for an accounting, and that Kimball has refused to render an account. Nor does complainant show any necessity for the appointment of a receiver or pray for the appointment of one. But is it not difficult to conceive of a "winding up" of the affairs of a corporation, when there is no necessity for the court to have the assistance of a receiver to collect, preserve and finally sell the assets of that corporation? The terms of the Agreement determined and fixed the powers, duties and rights of the Union, the American and the trustee. As Kimball afterwards became and continued to be a director of the Union, he certainly was friendly to the Union. But instead of requesting him to hasten the sale of the remaining assets of the American, the Union ignored the terms of the Agreement and its own obligation "to liquidate" the assets of the American

and caused this suit to be brought. Even the amended bill not only shows no need to appeal to a court of equity but, on the contrary, shows on its face an evasion of the terms of the Agreement upon which complainant relies.

II.

THAT EVEN THE AMERICAN NATIONAL WAS NOT OBLIGATED TO MAKE GOOD ANY DEFICIENCY REMAINING AFTER THE EXHAUSTION OF ITS ASSETS IN THE HANDS OF THE UNION NATIONAL AND KIMBALL; AND HENCE APPELLANTS WERE NOT LIABLE THEREFOR AS SHAREHOLDERS.

The Court of Appeals said (p. 398), "It is contended that in making the contract, executing the notes and transferring its assets the American National transcended its corporate powers and that no debt was thereby created which could be enforced against its shareholders. *Ward vs. Joslin*, 186 U. S. 142. We may, at the outset, *omit any consideration* of what might be the case were these transactions dependent alone upon the authority of the officers and board of directors of the bank, for the evidence shows clearly that what was done by them was ratified and confirmed by the shareholders." We discuss the matter of ratification and confirmation later. But the complainant and the Circuit Court proceeded upon the theory that the borrowing of money is one of the incidents in the ordinary course of the business of banking; that there was a *simple* borrowing of money by the American from the Union; and that the liability thus assumed by the American *ipso facto* should fall upon its shareholders. It seems, then, desirable at the outset to analyze the authorities cited by complainant and relied upon by the Circuit Court, adding two or three which show the history of or tend to throw light upon these authorities.

First National Bank vs. Nat'l. Exchange Bank, 92 U. S. 122 (1876); 23 Law. Ed. 679.

This case involved the question whether a national bank could take stocks in railroad and other corporations to compromise a doubtful debt owing to the bank. In its opinion by Mr. Chief Justice Waite, the court, in construing section 5136, R. S., said (p. 127):

> "Authority is thus given to transact such a banking business *as is specified*, and all incidental powers *necessary to carry it on* are granted. These powers are such as are required to meet all the legitimate demands of the authorized *business*, and to enable a bank *to conduct its affairs*, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities *in the regular course of its business*, as well as to become the creditor of others."

This was quoted with approval in *Western Nat'l Bank vs. Armstrong*, 152 U. S. 346, 351 (1894); 38 Law. Ed. 470, and to this the court added: "Nor do we doubt that a bank, in certain circumstances, may become a *temporary* borrower of money." Thus far there seems no doubt; but in the latter case the court proceeded to say that a *temporary* borrowing of money "would be so much out of the ordinary course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money" (p. 351), and this proposition has not been approved in the two cases in the Supreme Court hereinafter cited.

U. S. Nat'l Bank vs. First Nat'l Bank, 27 U. S. App. 605 (1894), and 49 U. S. App. 67 (1897).

The question in this case was whether the United States National Bank of New York, which had discounted notes for the First National Bank of Little Rock, Ark., *was chargeable*

with notice that the president of the First National Bank had procured the discount for his own personal benefit and not for the benefit of his bank. In the 49 U. S. Appeals (70 Fed. Rep. 298), the court, in its opinion by Thayer, Circuit Judge, in discussing the question whether rediscounting is outside of the sphere of ordinary banking, says (p. 301):

> "It is the duty of banks to make all reasonable efforts to supply their customers with money for all legitimate business purposes. *To that end* it is their right to exercise all of their corporate powers, including the power to rediscount. On some occasions, if this latter power was not freely and speedily exercised, a bank would be derelict in the discharge of its obligations to the public. One of the most useful functions which banks perform is to equalize the distribution of money, and make the supply in their respective localities satisfy, as far as possible, the demands of trade and commerce, by withdrawing money, as occasion requires, from those financial centers where it has a tendency to accumulate. It is obvious that this function can be best performed by banks by selling or rediscounting a portion of their bills receivable in those places where money is most abundant and cheap; and we have no doubt that it is usually so performed, and that many banks throughout the country are in the habit, at certain seasons of the year, of replenishing their stock of money by such means."

The court then points out the fact that the rediscount was made with its regular correspondent and in accordance with its regular habit. This case was taken to the United States Supreme Court and there appears as *Auten vs. U. S. Nat'l Bank*, 174 U. S. 125 (1899); 43 Law. Ed. 920.

The court said through Mr. Justice McKenna (p. 143):

> "The very object of banking is to aid the operation of the laws of commerce by serving as a channel for carrying money from place to place, as the rise and fall of supply and demand require, and it may be done by rediscounting the bank's paper or by some other form of borrowing. *Curtis vs. Leavitt*, 15 N. Y. 1; *First National Bank vs. National Exchange Bank*, 92 U. S. 122 (23; 679); *Cooper vs. Curtis*, 30 Me 488.

A power so useful cannot be said to be illegitimate, and declared as a matter of law to be out of *the usual course of business,* and to charge everybody connected with it with knowledge that it may be in excess of authority. It would seem, if doubtful at all, more like a question of fact, to be resolved in the particular case of the usage of the parties or the usage of communities."

The court then reviews the testimony and concludes:

"This testimony certainly has a very comprehensive scope, and there is no contradiction of it. It must be received, at least, as establishing that, as between the contending banks rediscounting paper was in the usual course of their business, and that besides it was the usual course of business in their respective localities. *Therefore,* the discounting of notes in controversy carried the sanction of such business."

Stapleton vs. Stockton, 91 Fed. 326 (1899), was cited by complainant in his argument. The Merchants National Bank of Ocala borrowed $15,000 from innocent parties while in daily operation and gave security therefor, and the $15,000.00 was used up "*in the regular operations of the bank.*" (P. 330.) As McCormick, Circuit Judge, says, (p. 330), the issue was one wholly between sreditors. The court held that the transaction was not a preference or a fraud on creditors under Sec. 5242 of the Revised Statutes.

Ditty vs. Dominion Nat. Bank, 75 Fed. 769 (1896) was also cited by complainant. This was a case where the president of the Citizens Nat. Bank borrowed $5,000.00 from the Dominion Nat. Bank in the ordinary course of the business of the Dominion National and the amount so borrowed was used in the ordinary course of the business of the Citizens National. The fact that this particular sum was borrowed for the purpose of replacing money embezzled by the president of the Citizens National prior to that time, was held not to affect the right of the Dominion National to recover, *because it had no knowledge*

thereof, and not to excuse the Citizens National from its obligation to repay the same, because it could not "retain it without assuming the burden of the president's knowledge as to how it came to be obtained."

Armstrong vs. Chemical National Bank, 54 U. S. App. 462, 83 Fed. Rep 556 (1899), was appealed to the Supreme Court and appears there as *Aldrich vs. Chemical Nat'l Bank*, 176 U. S. 618; 44 Law. Ed. 611. (1900.)

In this case the Chemical National was the New York correspondent of the Fidelity National of Cincinnati, Ohio, and with it the latter kept its, or a large part of its, reserve. Harper, as vice president of the Fidelity, sent to the Chemical its certificate of deposit and 27 notes as collateral, and the Chemical credited the account of the Fidelity with $300,000.00 (p. 628), and that credit was fully exhausted by the checks of the Fidelity bank drawn *"in the ordinary course of its business."* (P. 636.) But Harper, through manipulations in the Fidelity bank at Cincinnati, appropriated to his own use an equal amount.

The court says (p. 627):

> "In the view we take of the present case it is not necessary to extend this opinion by a review of the numerous authorities which, it is contended, support the general proposition that a national bank is entitled under the law of its creation and *in the conduct of its business* to borrow money, and that the lender is not obliged to show that the officer or agent acting for the bank had special authority to negotiate the loan."

And continues (p. 628):

> "We have then a case in which a national bank *having used in its business* money which its vice president obtained as a loan to it from another national bank denies all liability to account for the same upon the ground that the loan was not negotiated by it or by its direction, as well as upon the ground that it could not itself have

legally borrowed the money from the other bank. Do the statutes relating to national banking associations require that such a defense be sustained? This question is recognized by the court as one of great importance, and has received careful consideration in the light of adjudged cases. We proceed to the examination of the cases."

And after such examination, thus concludes on page 635:

"Without further citation of cases we adjudge, both upon principle and authority, that as the money of the Chemical Bank was obtained under a loan negotiated by the vice president of the Fidelity Bank who assumed to represent it in the transaction, and as the Fidelity Bank used the money so obtained *in its banking business* and for its own benefit, the latter bank, having enjoyed the fruits of the transaction, cannot avoid accountability to the New York bank, even if it were true, as contended, that the Fidelity Bank could not consistently, with the law of its creation, have itself borrowed the money."

In regard to these cases it will be observed, (1) that the moneys were loaned by banks in good faith in the usual course of the business of banking; (2) that the moneys were borrowed by banks in the usual course of the business of banking; (3) that the moneys so borrowed were actually paid out by the borrowing bank in the usual course of the business of banking, or if not actually so paid out, then the loaning banks had no knowledge of the diversion thereof and were not parties thereto; (4) that the power to borrow is an incidental power and is limited to occasions when borrowing is "necessary to carry on the business of banking;" and (5) that all borrowing approved was of a temporary nature.

Another case relied upon by the courts below is *Schofield vs. State Nat'l Bank*, 97 Fed. Rep. 282 (1889), 38 C. C. A. 179.

The facts in this case are clearly and fully stated in the opinion of Judge Sanborn and cannot well be summarized. The Union Bank had assumed the debts of the State bank and taken some of its assets as security in 1894. Both banks after-

wards became insolvent and receivers were appointed—whether by the comptroller or otherwise does not appear. Several years after the transaction, the receiver of the Union National brought this action against the State National and offered (p. 285), to return the uncollected securities he held and asked judgment against the State National for the difference between the amount of the debts of that bank, which the Union National had assumed, and the amount which the Union National had realized from the assets, which the State National delivered to it and to the trustee. Judgment was for defendant below and that judgment was affirmed by the Court of Appeals.

From this statement, brief though it is, it appears that the case did not involve the question of the powers of the State Bank or the question of the liability of the State Bank or its stockholders for any deficiency. Hence the court very properly *did not consider* those questions. Upon one question in the case, towit, whether the transaction was *ultra vires* the Union Bank, the court said (p. 287): "This agreement required the Union Bank to do nothing which national banks are not authorized to do—nothing which *they* do not do *in the conduct of the ordinary business of banking*"; that the bank was empowered by Rev. St. Sec. 5136, "to exercise * * * * *all *such* incidental powers as shall be necessary to *carry on the business of banking;*" that the Union Bank had a right to buy office furniture and fixtures and to rent an office and proceed "to occupy and use it to operate its bank;" that it had a right to receive deposits and it did this; that it had a right to discount and purchase paper, and it did this. In other words, what it did, it was authorized to do in *carrying on its business as a bank.* It did not sell its office furniture and fixtures and vacate its office, nor did it end its relations with its correspondents, its depositors and other customers. It did not put it out of its power "to op-

erate its bank." This underlying idea is clearly developed in the third paragraph of the syllabus, which is as follows (p. 283):

> "A contract by a national bank to assume and pay the liabilities of another bank in consideration of the transfer to it by the other bank of its office furniture and lease and its cash and cash assets, and the further assignment to a trustee for its benefit of the bills receivable and securities, is not *ultra vires*, but is within its powers referred by statute *to conduct a general banking business.*"

For these reasons alone, it seems difficult to see how that case has any tendency to sustain the proposition that the transaction in the case at bar was not *ultra vires* the American or was of such a nature as to impose any liability upon the shareholders of the American. But there are also other reasons based upon fact and law which differentiate that case from the case at bar: (1) In that, there was an attempt to rescind an executed agreement; in this, there is an attempt to impose a liability for a deficit arising out of an executed agreement. (2) In that, part of the assets of the State Bank were turned over to the Union; in this, all the assets of the American were turned over to the Union. (3) In that, the shareholders of the State Bank ratified and approved the action of its directors; in this, the shareholders of the American took no action. (4) In that, the selected securities were turned over by the State Bank to McNeil, its president, as trustee, and he proceeded to collect them; in this, the assets of the American were turned over to the Union of Omaha to be liquidated, and it and Kimball proceeded to liquidate them. (5) In that, the agreement left the State Bank (p. 289) *free from liability* to the Union Bank for the money it expended or agreed to expend on account of the debts of the State Bank; in this, the main contention of complainant is, that the Agreement between the American and the

Union left the American and its shareholders *still liable for any deficit.*

Having examined, as we proposed to do, the authorities relied upon by complainant and the courts below, and having determined, as best we could, their scope and bearing, let us point out the salient features of the transaction which took place between the American and the Union—one result of which was the note upon which complainant seeks to recover against these appellants. A *preliminary* question, however, is this:

WHAT WAS THE SITUATION OF THE BANKS BEFORE THE TRANSACTION?

They were both in active operation within a block of each other. They were of about the same size and were active competitors. The object of the officers of the Union was not to come to the rescue of the American or to relieve the American, or to "loan money" to the American. This would have exposed their bank to the danger of a forfeiture of its franchise under U. S. Rev. Stats., Sec. 5200. It was to get rid of a rival bank by buying it up and to secure its business and its superior location The object of the officers of the American, so complainant says, was to avoid probable demands by state, county and city treasurers for funds on deposit; and yet he did not even prove the amount of such deposits. Under the laws of Nebraska, the state, county and city treasurers could not go out of office for weeks after December 21, 1905 (see exhibits B and C respectively, hereto attached in an appendix), while the evidence shows that they or their successors all continued their deposits in the Union. (Mr. Rainey, p. 193.) Thus far the American had paid all demands upon it promptly. Why the need of such haste (the Agreement signed on Saturday and possession on Sunday) that not a single shareholder was consulted? The

regular annual meeting of the shareholders was to occur, and did occur, (p. 258, Exhibit 9), on January 14, 1896. It is incumbent upon complainant, who has the burden of proof, to show to the court the *facts* upon which the officers of the American based their action, if he seeks to justify and rely upon it. He should have proved the statements or actions, if any, of the treasurers which made withdrawals of deposits probable by them; the amounts of such probable withdrawals, whether sufficient to be a serious matter; the efforts of the officers of the American to be prepared to meet such withdrawals in the usual course of business by discounting paper held by the bank or by securing a temporary loan. Instead of this, he relies entirely upon the evidence of Mr. Baird, who acted throughout as the attorney of Minot. Judging from the Agreement, the *apparent* object of the officers of the American was *not to borrow money,* but to sell the bank, close its business, and have its assets liquidated and its debts paid.

But whatever the purpose, apparent or real, this remains: that the American was a going concern and owed the Union nothing.

WHAT WAS THE TRANSACTION?

1. The preamble of the resolution adopted by the Board of Directors of the American on December 21, 1895, says: (Exhibit 7, p. 255.) "Whereas, the officers of this bank and the officers of the Union National Bank of Omaha, Nebraska, have negotiated and agreed upon the *sale* by this bank to the Union National Bank of the *business and assets* of this bank upon the terms and conditions embodied in the agreement, of which the following is a copy." The Union National is charged with notice of this resolution, as it was the only authority, such as it was, the officers of the American had for signing the agreement.

2. The Agreement itself comes next and was executed and delivered that night.

In the first paragraph it provides, "The party of the first part hereby agrees to sell and assign *and does hereby sell and assign,* to the second party, its *cash on hand, office furniture* and *fixtures,* and such of *its bills receivable,* as the party of the second part on examination may be willing to take as cash without recourse on the party of the first part." Here is unquestionably an absolute sale of five different kinds of property, except that the number and amount of the bills receivable still remain at the option of the Union.

In the second paragraph it provides, that the Union National Bank shall "*liquidate* the remaining assets of the party of the first part, which may not be taken and received as cash by the party of the second part, without charge or expense to the party of the first part, except such court charges and attorney's fees as may be found necessary, and that *such liquidation* shall be conducted *under the direction* of Thomas L. Kimball." This is also clear. The Union is to do the liquidating, but it is to employ Kimball to act for it and is to pay him for his services. Just as A might say to B, "I will form a parnership with you to engage in manufacturing and selling goods, provided you will employ my son." The business is the business of the partnership and is under the control of the partnership and the son is employed by the partnership, but he is designated by A. The expenses of this liquidation were to be borne by the Union, except such court charges and attorney's fees as might be found necessary to such liquidation.

In the third paragraph it provides, that the American "hereby agrees to *sustain and pay* one-half the loss and expense which the party of the second part may sustain on account of removal from its present quarters by reason of its unpaid lease on its present place of business, and one-half of the loss which the party of the second part may sustain on the sale of its office furniture and fixtures, which furniture and fixtures

are agreed upon at the present price and value of three thousand seven hundred and fifty ($3,750.00) dollars,"—that also being the price and value fixed upon the furniture and fixtures of the American. This imposes upon the American the obligation to pay at an *indefinite* time in the future an *uncertain* amount. It is the creation of a *new* liability, and it cannot be said to be in any sense of the word a mere substitution of debts.

In the third paragraph it also provides, "The party of the first part further agrees to guarantee, *and does hereby guarantee* the party of the second part against any and all loss on account of assuming the liabilities of the party of the first part as aforesaid. And to *this end* the party of the first part agrees to execute and deliver to the party of the second part the three promissiry notes * * * * which notes shall drawn interest from date at the rate of six per cent. per annum, payable quarterly annually, and be payable in one, two and three years from date, respectively, and shall be non-negotiable. And in case of non-payment of any of said notes when due, the whole of said principal sums of all of said notes and accrued interest shall thereupon become due." That is, the notes are to be made for the purpose of making the amount thus guaranteed and the future times at which it shall be payable definite, and of determining the rate of interest such amounts shall bear. The guaranty is in effect that the assets shall turn out on liquidation to be sufficient to meet the amount of liabilities assumed by the Union. The time allowed for the liquidation is indefinite —dependent upon the success attending it and the wishes of the Union.

In the third paragraph it also provides, "And as further security to the party of the second part, the party of the first part agrees to sell and assign and *does hereby sell and assign* to the party of the second part all of its assets which remain * * * * subject to the right of said Thomas Kimball, or his suc-

cessor, to collect and convert the same into cash for the use and purposes hereinbefore expressed." This transferred the legal title to all other personal property not hereinbefore sold and the equitable title, at least, to all real estate, to the Union. Not a vestige of property wes left in the American. Neither it nor its Board of Directors could exercise any direction, or even supervision, over any of the assets which had formerly belonged to it. Nor is there any evidence that the Board of Directors ever attempted to do so.

3. The Agreement was immediatey carried into effect. It was executed and delivered on Saturday, and on the evening of that day the Union moved over and took possession of the office and furniture, etc., of the American. After working Sunday, the Union was ready at the opening hour on Monday to go on with its own business and the business of the American, and the assets of the American were in the possession and control of the Union and of Kimball, trustee.

4. The *amount* of the notes was determined and the notes signed later, on Monday, December 23, and a cashier's check given for $39,929.51—thus leaving no inducement for the Union to take any "bills receivable" not immediately convertible into cash.

WHAT WERE THE RESULTS OF THAT TRANSACTION?

1. The American sold its means (office, furniture, goodwill) of doing business and its cash and cash items absolutely, and transferred the title (legal and equitable) in *all* its remaining assets to the Union. It *ipso facto* ceased to do business as a bank, the only purpose for which it was organized.

2. It and its Board of Directors surrendered all control over its assets and the liquidation thereof, thus inrusting to others the exercise of all powers and discretion as to selling, collecting, compromising and applying the proceeds.

3. It guaranteed that such assets, so placed beyond its control and the control of its directors, should continue to be sufficient at some future time to meet the new obligations assumed—that is, that a sufficient number of its debtors were and should remain solvent and that its other assets should not shrink in value unduly.

4. It agreed to pay at an indefinite future time an indefinite sum to make good the losses (i. e., from the sale of the furniture and from the lease on the old quarters of the Union) which were inevitable, but which, and the causes of which, *had not existed prior* to December 21, 1895. The amount paid out of the assets of the American on account of this item of the lease alone, was $3,538.82. (See page 3 of Exhibit 33, page 289. The items and dates of payment from January 2, 1896, to December 27, 1897, appear on pages 12, 13 and 14 of Exhibit 33, found on pages 296-300 of the record. See, also, Burness, p. 246.)

5. Its officers executed and delivered its three non-bankable notes, they being non-negotiable in form and maturing at long periods—one, two and three years.

6. Its officers executed and delivered such notes after it had ceased to do any banking business and after it had sold and the Union had taken possession of, all its assets.

7. It agreed to pay interest at six per cent. per annum on $201,000.00 from and after December 23, 1895—$1,000.00 per month, $33.33 per day.

8. It imposed upon its shareholders, in addition to the liability for losses in paragraph 4 above and of interest in paragraph 7 above, a liability on and after December 23, 1895, of $201,000.00, *while they still remained liable* for every deposit in or claim against the American which was not actually paid by the Union or for which such depositor or claimant did not accept the Union as its debtor in lieu of the American. *Even if*

the words in the Agreement "to assume the liabilities of the party of the first part to its depositors and on account of its bills payable," obligated the Union to pay *all* the "debts, contracts and engagements" of the American for which its shareholders were liable, complainant has not proven or attempted to prove that the Union has paid them all; and even the Circuit Court has never made an order requiring other creditors of the American to present their claims and fixing a time within which they should do so.

9. The actual net result, financially, as shown by the decree, is this: The assets of the American have disappeared and there remains unpaid upon the notes $194,466.35. Or, to put it in another way, there has been credited upon the principal of the notes only $6,533.65, although complainant and the Union have received *as payments* upon the notes $66,330.40 (see page 5 of Exhibit 33, page 290; and Burness, p. 228), and $14,637.86 (see order, p. 125) making a total of $80,968.26. That is, $74,434.61 ($80,968.26 less $6,533.65), has been absorbed by way of interest on the three notes, and this is directly due to the *prolongation* of the liability of the American by reason of this transaction. Nor does this include the $10,258.50 expended on account of other items of interest (see pp. 291 and 292); nor the $5,827.15 expended on account of taxes from 1895 to 1900—the greater portion of which items were directly traceable to such *prolongation*. (See pp. 292 to 296.)

Such was the transaction and such were its results, briefly stated; and both are so fundamentally different from those upon which the authorities relied upon are based, that one cannot avoid a feeling of surprise that the Circuit Court did not apply the quotation from *King vs. The First National Bank* (Record p. 128) to them, instead of the *Schrader and Ward* cases. But we shall examine later those two cases and *Richmond vs. Irons*, which preceded them.

As the shareholders in a national bank are only *secondarily* liable and as the assets of the bank must be duly exhausted before their liability arises (*National Bank vs. Kennedy*, 84 U. S. 19, 21 (1873); 21 Law. Ed. 554, and *U. S. vs. Knox*, 102 U. S. 422, 425, (1880); 26 Law. Ed. 216), it follows that such shareholders can never be held liable unless the bank itself is also liable; although, as we shall see later, the shareholders may not be liable when the bank itself may be. This leads us, first, to inquire whether its Board of Directors *acting alone* had authority to bind the bank in and by such transaction; and second, whether the American itself had power to enter lawfully into such transaction.

WAS THE TRANSACTION *INTRA VIRES* ITS BOARD OF DIRECTORS?

The general rule is, that directors have no power, unless it is expressly conferred upon them, to make or consent to any fundamental change in the organization, charter or powers of a corporation, or to do other acts not within its ordinary business. *Chicago City Ry. Co. vs. Allerton*, 85 U. S. 233 (1874), 21 Law. Ed. 902. They have, *prima facie*, no authority to dispose of all the property of the corporation, discontinue its business and wind up its affairs

If, as held in *Roberts vs. Hill*, 24 Fed. 571 (1885), a national bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will *presently* be unable to meet its obligations, and will be obliged to suspend its ordinary operations, then it was the duty of the directors of the American to have called the attention of the Comptroller to that fact in order that he might investigate the condition of the bank. If he had found it necessary, he would have ordered the shareholders to make good the capital stock under Sec. 5205 and, if they had failed to do so, he would have

appointed a receiver. This course would have been in harmony with the provisions of the national banking Act and would have enabled the shareholders to elect either to continue the business of the bank or to go into voluntary liquidation or to submit to liquidation under the supervision of the Comptroller.

If, on the other hand, as held in *Case vs. Citizens Bank*, 2 Woods 23 (1873), Fed. Cas. No. 2489, a bank is insolvent only when it is unable to meet the demands *actually* made upon it in the ordinary course of its banking business, then the directors of the American did not have the slightest excuse for disposing of all its assets and closing its doors. Such a condition would not authorize the directors of any corporation to take such action, unless they were given special and unusual powers by the laws creating the corporation or by the charter accepted by the shareholders. Nor should we forget, that in the case at bar the right of the directors to dispose of all the property of the bank did not depend upon extrinsic facts resting peculiarly within the knowledge of such officers, but was incidently prohibited by the national banking act. Nor even if it had depended upon intrinsic facts, should we forget that the exact condition of the American was fully known to the Union from its examination of the books of account of the American and of the verious assets of the American, before the amount for which the notes were to be given under the terms of the contract could be determined.

But, in this connection, I may be permitted to repeat that when the Board of Directors of the American passed the resolution of December 21, 1895, the American was not in any immediate peril and did not owe the Union a single cent. There was only an alleged possibility that it might at some future time be called upon to pay three of its depositors—both time and amount being left indefinite by complainant's evidence. To say that directors can conclude in their own minds that there

may be a possible danger ahead of a corporation, and without using the ordinary means available to meet such danger (for instance, re-discounting some of its paper), can divest themselves of their trust and its obligations, and immediately dispose of all of its assets and close its doors forever, is to run counter to the authorities and to ignore one of the just rules protecting the rights of the stockholders. Again, every argument which follows and tends to convince one's mind that even the American itself did not have power to enter lawfully into this transaction, is doubly strong against such an implied power existing in the Board of Directors alone.

WAS THE TRANSACTION *INTRA VIRES* THE AMERICAN?

A corporation in general has such powers, and such powers only, as are expressly or impliedly conferred upon it, and any act which is not within the powers so conferred is impliedly prohibited. If certain powers are conferred by the law under which it is organized, then the law is construed as excluding or witholding all other powers than those enumerated, and such incidental powers as are reasonably necessary to the proper exercise thereof. The existence or non-existence of a power cannot be determined by what might or what might not benefit the corporation or its stockholders in a particular case, nor by the consent or non-consent of the corporation or its stockholders. (See, for instance, *Germania, etc., Co. vs. Boynton,* 71 Fed. 797, 801 (1896), 37 U. S. App. 602.) The whole matter has been clearly put by Justice Gray in a leading case, *Central Trans Co. vs. Pullman's P. C. Co.,* 139 U. S. 24, (1890), 35 Law. Ed. 55. And this is re-affirmed in later cases; but more of this hereafter.

This general principle has been applied to national banks and, as held in *Cal. Nat. Bank vs. Kennedy,* 167 U. S. 362, 366 (1897), 42 Law. Ed. 198, 200, "It is settled that the United States statutes relative to national banks constitute the *meas-*

ure of authority of such corporations, and that they cannot *rightfully* exercise *any* powers except those expressly granted or which are incidental to *carrying on the business* for which they are established."

Now, applying this principle to the case at bar, we contend:

First. That there is no power to enter into such transaction expressly given to national banks. It must, therefore, if granted at all, be an "incidental power."

Second. That the "incidental powers" of national banks are defined and limited expressly and affirmatively in Section 5146, Rev. Stats. They are only "such * * * * as shall be *necessary to carry on the business of banking.*" They are not such as may seem best to adopt to stop the business of banking or to liquidate the affairs of the bank after it has been stopped. Those matters are regulated in other sections of the banking act and will be considered next below. But this section applies *only* to the powers to be exercised while the bank is in active operation and, even then, strictly limits such incidental powers by stating that such active operation shall be carried on "by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; *by* receiving deposits; *by* buying and selling exchange, coin and bullion; *by* loaning money on personal security; and *by* obtaining, issuing and circulating notes according to the provisions of this title."

If, then, we apply the general rule that the enumeration of powers implies the exclusion of all others, we find no incidental power in the American to engage in such a transaction. Nor is it an answer to say, that *third* parties equally guilty with a national bank cannot in some instances plead that the act in which they joined and of which they received the benefit (such, for instance, as the loaning of money on a real estate mortgage) is not binding upon *them*. For all such cases start

with the proposition that such acts *are* beyond the incidental powers of a national bank and *are* grounds of forfeiture by the government of the privilege of doing a banking business; and no act of which may be a ground of forfeiture can be said to be done lawfully under an incidental power. This is illustrated by *Cal. Nat. Bank vs. Kennedy*, 167 U. S. 362 (1897), which holds that a national bank cannot under section 5136 purchase stock in another national bank, even though it may have power to become the owner thereof by taking it as collateral and buying it in at a sale to enforce the payment of the amount loaned upon it.

Third. That the power to enter into such a transaction is also impliedly denied by the *general trend* of the laws governing national banks and the *object* those laws have in view. Under those laws there can be only two kinds of liquidation—one voluntary, the other involuntary. Let us, then, examine the provisions with reference to them particularly.

Involuntary liquidation—Failure to restore the capital stock to the minimum required by law (5141), failure to maintain its surplus (5151), failure to make good its reserve (5191), failure to dispose of any of its own stock rightfully acquired by it (5201), failure to make good its capital stock when impaired by losses (5205), false certification of checks drawn upon it (5208), refusal to pay its circulating notes (5234), forfeiture of its franchises by a court (Sec. 1, Act of June 30, 1876,) or failure for 30 days to pay a judgment against it (*id.*),—each is a cause for the appointment of a receiver of the bank by the comptroller. Not only this, but he should do so whenever he is "satisfied of the insolvency" of such bank (*id.*).

These provisions are so minute and yet so broad, that it would be difficult to imagine a condition not met by them. And yet the remedy is always the same, to-wit: a liquidation of its

affairs by a *public* officer who is under bond and oath, who represents both creditors and stockholders, and who is far removed from the influence always exercised by large shareholders in ordinary liquidations.

Voluntary Liquidation—Sections 5136 (Second) and 5220 provide that a bank may be voluntarily dissolved and liquidation upon a two-thirds vote of its shareholders. Section 8 of the act of June 20, 1874, makes it the duty of the treasurer and national bank depositaries to assort and return to the treasury for redemption the notes of such national banks as have failed or gone into voluntary liquidation, and section 5223 provides that the treasurer cause such notes "to be mutilated and charged to the redemption account of the association." The purpose is to withdraw *speedily* from circulation the notes of such banks as are no longer engaged in active business. Such a transaction as the one in question is diametrically opposed to these provisions. By that Agreement the American sold to the Union, with its other assets, its equity in the bonds deposited with the treasurer to protect its circulation and, if it had not gone through the form of "voluntary liquidation," those bonds might have remained there to this day and the notes secured thereby be still in circulation. Surely Congress did not intend that it should be within the power of national banks to bring about such a result.

Section 5221 provides the *method* of procedure—how notice shall be published in order that claims may be duly presented to the bank. It manifestly implies that the Board of Directors of the bank shall have an opportunity to admit or reject any claim so filed. Certainly, it does not imply that the directors of another bank or any private individual shall have the exclusive right and power to admit or reject claims made against a bank which is in process of liquidation. Indeed, the very existence of the bank continues so that *it* may sue and be

sued. *Central Nat. Bank vs. M. L. I. Co.*, 104 U. S. 54, 73 (1881), and *Chemical Nat. Bank vs. Hartford Deposit Co.*, 161 U. S. 1, 8 (1896). And yet the Agreement between the American and Union gave to the Union and to Kimball the sole and final determination what claims against the American should be paid voluntarily. There was nothing to prevent the payment of claims which the directors might have desired to contest; and *vice versa*. The rights and duties of directors, which are set out in section 5145 and mentioned below, could not be abrogated in this way.

Fourth. That the power to enter into such a transaction is impliedly prohibited by certain other sections of the laws governing national banks.

Section 5145 provides that "The *affairs* of each association *shall* be managed by *not less* than *five directors*," and that *each* of them must be personally interested in the bank as a shareholder. Section 5147 provides that each of the directors "*shall* take the oath that *he* will * * * * diligently and honestly *administer* the *affairs* of such corporation." And in *Richmond vs. Irons, post*, the Supreme Court clearly intimates that the duties and responsibilities of the directors do not end when a bank closes its doors, but extend through the whole process of liquidation. And the important place in the national banking system held by these sections is shown in *First Nat'l Bank vs. Hawkins*, 174 U. S. 364, 368 (1899). But under the Agreement, the duties and responsibilities of the directors absolutely ceased.

Section 5133 (second paragraph) determines the limit of time for which a bank may exist, unless sooner dissolved "by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law." And this is inconsistent with the idea that its directors can dissolve it *de facto*, as was done in the case at bar.

Section 5137 provides that a national banking association "may purchase, hold and convey real estate" for the purposes therein mentioned, but does not authorize the mortgaging of real estate or the conveyance thereof as security for money borrowed by it. And this provision is exclusive; and its violation is a ground of forfeiture by the government.

Section 5202 provides, "No association shall at any time be indebted, or *in any way liable,* to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, *except* on account of demands of the nature following," and the three notes for $201,000.00 are not of such a nature, while the capital of the American was only $200,000.00; and this $201,000.00 does not include the cashier's check for $39,929.51, nor the liability assumed in the Agreement by the American for loss upon the furniture and lease of the Union. It will not do to say, that because the notes represented partially money used in paying off "moneys deposited with or collected by the association," it thereby lost its own nature and acquired their nature. (*Richmond vs. Irons,* and *Ward vs. Joslin, post.*) Nor can it be said that the Union had no means of knowledge as to the *status* of the American, nor that a mistake as to the law excuses it.

Section 5222 provides that such association, within six months from the vote to go into liquidation, "*shall* deposit with the Treasurer of the United States lawful *money* of the United States sufficient to redeem *all* its outstanding circulation." And yet in the transaction in question the American actually sold and delivered all its cash and cash items to the Union and put it out of its power to comply with this section. If this section was compiled with formally, it was done by some arrangement made outside of that Agreement, and in that arrangement the American and its directors had no voice whatever. It may have been done nominally in its name or by its officers, but it

must, in fact, have been done with money advanced by the Union, or with the proceeds of the sale or collection of the assets held by it for liquidation.

Section 5230 provides that the United States "shall have a *paramount lien* upon *all* its assets" to secure any deficiency in the proceeds realized from the bonds deposited by the American to secure its circulating notes. And yet, by this transaction, the American sold and delivered *all* its assets to the Union, and its cash and items taken as cash were mingled with the funds of the union. If the Union had failed, the United States could not have separated these from the general assets of the Union. Such a transaction might have made it difficult or impossible for the government to enforce its lien. *First Nat. Bank vs. Colby*, 88 U. S. 609 (1875), 22 Law Ed. 687.

Section 5153 makes the national banks depositories of public money, and section 5497 provides the penalty for the unauthorized receipt or use of public funds, and is so broad in its terms, that if the American had public money on deposit and the Union received it in this transaction, the officers of the Union would be liable for the penalty provided. It will not do to say the American had no such funds. We do not know whether it had or not; but the fact that the exercise of such a power in any case might lead to a violation of the criminal laws is *prima facie* evidence that Congress did not intend to grant it.

Section 5146, on the one hand, requires that at least three-fourths of the directors of a national bank shall reside in the state in which the bank is located; and, on the other hand, ~~requires~~ each director to own only ten shares of stock. This *compels* non-resident shareholders to rely exclusively upon the honesty and capability of resident directors. If, then, the transaction in question is held to be *intra vires*, it follows that a majority of the directors of any national bank, being residents

and owning only a very small fraction of its stock, can without the knowledge of shareholders in other states, who may own a large majority of the stock, close the bank, sell its good-will to another bank in that locality (in which they are, or in which they may become directors), put its assets out of their immediate control, trust the liquidation of the affairs of the bank to others with power to prolong such liquidation indefinitely, guarantee that its assets, so managed, will ultimately produce certain results, and thereby make such non-resident shareholders liable for any deficiency which ultimately may arise from the transaction. In the case at bar, the directors who approved the deal held altogether only 180 out of 2,000 shares of the Capital Stock of the American.

Fifth. That the power to enter into such a transaction is expressly prohibited by section 5242 of the U. S. Revised Statutes.

For said section expressly says that any transfer or assignment made by a bank in contemplation of insolvency "with a view to prevent the application of its assets in the manner prescribed by this chapter or with the view to the preference of one creditor to another * * * *shall be null and void.*" The only excuse for the transaction given by complainant's witnesses was, that the American would *soon* be unable to pay the deposits held by the state, county and city treasurers. The Agreement was, then, made to all intents and purposes in contemplation of insolvency. Again, the manner of the application of the American's assets provided in the Agreement was neither by its directors in voluntary liquidation nor by the Comptroller in involuntary liquidation—the only two processes recognized in the chapter. Again, if the Agreement had been carried out by the Union and Kimball according to its express terms, it would have had no other result than the preference of one creditor over another. The United States banking laws

do not recognize any greater right to payment in the case of a depositor or of one holding a "bill payable," than in the case of any other creditor of a bank; but the Agreement provided that the Union should only "assume the liabilities of the party of the first part (the American) to its depositors and on account of its bills payable;" and to secure the Union for *that* liability, *all* the assets of the American were by the Agreement transferred and assigned to the Union to be liquidated under the direction of Kimball. But there were then existing other claims against the American and other creditors. The American was indebted for salaries due its employes to Dec. 21st, for taxes due the city of Omaha, for sums due attorneys for services theretofore performed, for rent, and for other outstanding obligations. For instance, there were "liabilities prior to liquidation" to the amount of $22,799.90 (Record, p. 281 and which are itemized on page 289), and "expenses prior to liquidation" to the amount of $4,985.99 (Record, p. 281, and which are also itemized on p. 289). The first item included, among other things, interest on public funds, to-wit: county funds $293.24; city funds $7.94; state funds $1.83; and interest on bank balances $4.55 and $147.20 due William Minot and $20.61 due Lawrence Minot (Record, pp. 289 and 291). It also included "overdrafts with correspondents" $2,245.76 (Record, p. 289).

The second item included, among other things, "duty on circulation" $225.79 (Record, pp. 289 and 296), and salaries from Dec. 15, 1895, $268.86 (Record, pp. 289 and 296), attorneys' fees (Record, pp. 289 and 291), court costs, personal taxes (also p. 292) and rent to Dec. 23, 1895 (also p. 226).

"Bills payable" do not embrace any of these items. Record, pp. 186, 238, 274. Bouvier (Rawle's Edn. 1897). None of these creditors were "depositors." The *terms* of the Agreement, therefore, did not provide for them and *the Union was*

not obligated to pay them. But *all* the assets of the American had been assigned to and transferred to the Union—thus leaving nothing to meet the other obligations of the American. As the Union had not assumed them, *it did not, in fact, pay them or advance the money to pay them.* It is true, these obligations were paid out of the assets of the American so assigned and transferred. Whether this was done with the consent of the Union does not appear and is immaterial. The point is that the Agreement under which these three non-negotiable notes were given was on its face "null and void" *at the time* it was approved by the directors of the American and was executed and delivered by the two banks. It could not be validated by subsequent acts of the Union or Kimball, in which acts the American did not join. Indeed, it could not be validated by anything which the banks and Kimball might do, even had all three acted in concert.

National banks are not mere private money-making corporations. If that was the sole object of their existence, Congress would never have had any legitimate reason for passing laws for their organization and management; and state banks, which had power to issue notes for circulation, would have been permitted to continue to exercise that power. (Sec. 19 of Act of February 18, 1875). But national banks are instrumentalities of the government and were created to provide a national currency and for its circulation and redemption and to serve as safe depositaries of public money. (See title to banking ace and Sec. 5153, Rev. Stats.) "The key to the proper interpretation of an act of Congress is its policy and purpose." (*Mercantile Nat. Bank vs. New York*, 121 U. S. 138—1887). To say that such an instrument of government can cease its functions in any way other than that provided by law, is to say that the shareholders of a bank having assumed certain re-

lations to the government--relations which are beneficial to the government—may change those relations at any time and in any way they deem fit. *Prima facie* and as a matter of broad public policy, this cannot be done by them even when they act collectively and unanimously, and in a regular or properly called special meeting. Certainly a portion of them acting directly or indirectly cannot do it. Much less can the officers—mere agents of the shareholders—do it. But in addition to all this, the Act is complete in itself, provides expressly when and by whom a bank shall be liquidated and is exclusive of all other methods.

In *Nat'l Bank vs. United States,* 107 U. S. 445 (1883), 27 Law Ed 537, the court, in holding that Sec. 3466, Rev. Stats., which gives priority to the general demands of the United States against insolvents, did not apply to national banks, said:

> "*Everything* essential to the formation of the banks, the issue, security and redemption of their notes, the *winding up* of the institutions and *the distribution of their effects,* are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates."

And in an able opinion, Judge Blodgett (*In re Manufacturers' Nat. Bank.* 5 Biss. 499 (1873), Fed. Cas. No. 9051), held that when the legislature creates a corporation, it can also prescribe what remedies shall be had against it and that such remedies then become exclusive; and that the Bankruptcy Act, although broad enough in its terms, did not make national banks liable to be proceeded against in bankruptcy.

In *First Nat. Bank vs. Colby,* 88 U. S. 609 (1875), 22 Law. Ed. 687, the Supreme Court said:

> "The act of Congress prescribes the condition upon which national banks shall be created; the powers they

shall possess; and the consequences of their failure to meet their obligations. All persons dealing with these institutions can only acquire and enforce rights against them under the limitations there designated."

In New Jersey a failing corporation cannot sell out all its assets to another corporation, in as much as the statutes authorize a dissolution by a failing corporation, and the sale can be made in connection with such dissolution. (*Hunt vs. American, etc., Co.*, 81 Fed. Rep. 532 (1897).

In *Bank Comr's vs. The Bank of Brest*, 1 Harr. Ch. (Mich.) 106, 111, 112, the court said:

"The assignment set up in the answer is an assignment by the directors of *all the* estate, real and personal, and assets and effects of the bank, to a trustee. A transfer by way of security of a *portion* of its effects for the purpose of *carrying on* the concern is within the power of the directors; and a corporation which has *no particular mode* pointed out for closing its concerns may make an assignment on obtaining the assent of the stockholders. * * *

The directors, in making the assignment in question, without authority from the stockholders, have exceeded their powers.

They are made trustees of the stockholders, for the purpose of carrying on the business of the corporation, and not for the purpose of winding it up and destroying its existence. *Angel and Ames on Corp.*, 507; 3 Des., 557.

The statute prescribes the manner in which the affairs of this class of corporations shall be wound up in case of insolvency. This forms a part of the security to the public, and is one of the conditions upon which they take their chartered powers. An assignment made manifestly with a view to evade the provisions of the statute, as this seems to have been, is against the policy of the law, and cannot be sustained."

The Supreme Court has held in *Graham vs. Railroad Co.*, 102 U. S. 148, (1880), 26 Law. Ed. 106, that corporations, unless restricted by their charters or by general statutes, may make assignments for the benefit of creditors to the same extent

that individuals may. But no one would contend for an instant that a national bank could lawfully make an assignment for the benefit of creditors. And yet the strongest plea, (to-wit: that this transaction was adopted to pay the debts of the American), urged upon the court below, was that this transaction had the effect of such an assignment.

As we have said before, the state has power to determine in the laws under which corporations are to be organized, how their *liquidation* shall be conducted. The parties interested are, the state, creditors, shareholders and the corporate body. When debts have been incurred, each of these four interested parties has a vested right in the method of liquidation provided by those laws. As shareholders, for instance, have a right to insist that the method provided by law shall be followed, it follows that every shareholder in a national bank, no matter how small his interest may be, has an absolute *right* to rely upon the provisions in the national banking laws and upon each of them; and no shareholder or combination of shareholders, and no officer or officers of his bank, has or have the power to deprive him of that right.

If, then, I am right, it follows that the transaction was not only beyond the powers conferred upon the American and in excess of the authority of its Board of Directors, but was prohibited by the national banking act and was against public policy. Hence, it was not only *ultra vires* in the sense that it was an act which was not and could not be authorized by the bank or its directors or its shareholders, but also in the sense that it was a n illegal act, i. e., contrary to public policy and in violation of the banking laws. The state courts are hopelessly at variance as to what are *ultra vires* acts, and as to what are the effects of such acts, and even the decisions of the Federal Courts are sometimes apparently conflicting—at least in the application of the rules established by the Supreme Court. But

we can readily distinguish the case at bar from many of the cases. It is not a case where a corporation has disposed of a part of its property in the usual course of business, nor a case where it has disposed of all property in *payment* and *satisfaction* of all its indebtedness, thus having a clear sheet. It does not involve simply an irregular or defective execution of powers possessed; nor does it involve the exercise of powers not possessed, but the exercise of which cannot result in anything unusual or illegal or contrary to public policy or injurious to the interests of any of the shareholders of the corporation. Nor is it a case where a contract has been fully executed on both sides and one of the parties is seeking to *deprive* the other of what has been acquired under it. Nor is it a case where the contract has been fully performed by one party and nothing done by the other party, except receive the benefits; for all the assets of the American were actually, even if unlawfully, transferred to the Union. Nor is it a case where a contract is apparently within the powers of a corporation, one party thereto, and the other party is ignorant of extrinsic facts rendering it *ultra vires*. Nor is it a case where a corporation, authorized to do so under some circumstances, executes and delivers a negotiable note for an unauthorized purpose and is sued by a *bona fide* purchaser thereof for value. Nor was it strictly a case where a contract has been fully performed by either party thereto; for, on the one hand, the Union had not fully liquidated the assets of the American, as it agreed to do, and, on the other hand, the American had not fully paid its notes. But, assuming *arguendo*, that the transaction in the case at bar is one where a contract has been executed on one side only (and this is most favorable to complainant), the Supreme Court holds that the fact, that a contract has been executed by one party and the other party has received the benefit thereof, does not give the contract validity, and further holds that no action

will lie *on the contract*. Whether the corporation is plaintiff or defendant makes no difference.

Pearce vs. Madison, etc., 62 U. S. 441 (1859), 16 Law. Ed. 184.

Central Trans. Co. vs. P. P. C. Co., 139 U. S. 24 (1891), 35 Law. Ed. 55.

Louisville, etc., vs Louisville, etc., 174 U. S. 552; 567 (1899), 43 Law. Ed. 1081.

O'Brien vs. Wheelock, 184 U. S. 450, 490, (1902), 46 Law. Ed. 636.

But the answer of complainant was that he might disaffirm the contract and sue the American upon an implied contract to recover the money paid out by the Union for the benefit of the American. Assuming, *arguendo*, this to be true, it is immaterial what might have been done. But there was a good reason why complainant did not disaffirm the contract and sue these *shareholders*. He would have been met with this conclusive answer, "We have had no dealings whatever with you and we cannot be held liable for any action of the bank or its officrs which you admit was *ultra vires*."

It is unnecessary to discuss further the question whether the American, having assigned and transferred to the Union *all* its assets, is estopped to deny its liability to a deficiency judgment. For the Supreme Court has twice in recent years held that a shareholder can go behind even a judgment rendered against his corporation for some transaction in which it has received a valuable consideration, and can show that the transaction was not of such a nature as to impose any liability upon him as such shareholder.

Whitman vs. Nat'l Bank, 176 U. S. 559 (1900), 44 Law. Ed. 587.

Ward vs. Joslin, 186 U. S. 142 (1902), 46 Law. Ed. 1093.

And in the latter case also held, "If, however, under the state decisions, the corporation would be held estopped from denying the liability, it does not follow that the *stockholders* must therefore be held liable, if the obligation was, in fact, *incurred without authority.*" (151.)

III.

THAT THE LIABILITY OF SHAREHOLDERS IN NATIONAL BANKS IS A RESTRICTED LIABILITY AND THE TRANSACTION BETWEEN THE BANKS WAS OF SUCH A NATURE THAT APPELLANTS ARE NOT LIABLE FOR ANY DEFICIT ARISING THEREFROM.

But even though we assume, *arguendo*, that the transaction was not *ultra vires* the American or its Board of Directors, still the shareholders of the American are not liable for a deficit arising therefrom. A stockholder of a corporation is not, speaking generally, liable beyond the amount of his unpaid subscription, for its debts. (*U. S. vs. Stanford*, 161 U. S. 412, 429 (1895), 40 Law. Ed. 751.) We must then turn to Sec. 5151, Rev. Stats.—the only provision on the subject in the national banking law—to learn the liability of appellants as shareholders in the American. And, in this connection, we contend that the transaction was, to say the least, an unusual and even extraordinary one, while appellants under that section are liable as shareholders, *only* for the contracts, debts and engagements of the American *duly* contracted by it *in the ordinary course of the business of banking.* First, then, let us examine the cases upon that subject in the Supreme Court.

Richmond vs. Irons, 121 U. S. 27 (1887), 30 Law. Ed. 864.

The opinion was delivered by Mr. Justice Matthews.

Depositors in the Manufacturers' Nat. Bank having balances due them *at the time* it went into voluntary liquidation, accepted in payment thereof commercial paper held by the bank and endorsed and guaranteed in the name of the bank by its president. The court held that such depositors "are not to be considered as creditors of the bank entitled to subject the stockholders to individual liability." (p. 60.) Why? Because, "the individual liability of the stockholders as imposed by and expressed in the statute, is indeed for all the contracts, debts, and engagements of such association, but must be *restricted* in its meaning to such contracts, debts, and engagements as have been *duly contracted in the ordinary course of its business.*" This was formulated as a general rule (a general construction or definition of the meaning of the statute), and the persons against whom it was applied, had been *depositors*, in whose favor debts were incurred by the bank in the ordinary course of its business. Why, then, was it applied as against them? The court says, "It is not within the power of the officers of the bank, without express authority (from the shareholders), by such means to *prolong indefinitely an obligation on the part of the shareholders*, which is imposed by the statute *only as a means* of securing the payment of debts by an insolvent bank *when* it is no longer able to continue business, and for the purpose of effectually winding up its affairs. This is the very meaning of the word 'liquidation.' Mr. Justice Story said, in *Fleckner vs. Bank of U. S.*, 21 U. S., 8 Wheat. 362 (5:636): 'Its ordinary sense, as given by lexicographers, is to clear away, *to lessen debt*, and in common parlance, especially among merchants, to liquidate the balance is to pay it.' In *White vs. Knox*, 111 U. S. 787 (28:603), it was said: 'The business of the bank must stop when insolvency is declared.' In *National Bank vs. Insurance Co.*, 104 U. S. 54 (26:693), the

liquidation of such an association was said to be like that which follows the dissolution of a co-partnership." By the transaction in question in the case at bar, the debts of the American were not paid, nor even decreased. Its liabilities were, on the contrary, increased and prolonged.

Schrader vs. Manufacturers' Nat. Bank, 133 U. S. 67 (1890), 33 Law. Ed. 564.

The opinion was delivered by Mr. Justice Blatchford. This case grew out of *Richmond vs. Irons* and was based upon an agreement made after the bank went into liquidation *to continue* its guaranty of certain notes made *before* it went into liquidation. In other words, the nature of the liability remained the same. It was simply prolonged. The court quotes from *Richmond vs. Irons* at length, approves the rule there laid down, and concludes that the shareholders were not liable "in view of what was said by this court in the case of *Richmond vs. Irons*, before quoted."

Ward vs. Joslin, 186 U. S. 142 (1902), 46 Law. Ed. 1093.

In this case there was an attempt to hold a shareholder of the Western Investment Loan & Trust Co. of Kansas liable for a guaranty of the payment of certain notes, which guaranty was given *for a valuable consideration*, and while the company *was a going concern*. The opinion was by Mr. Chief Justice Fuller. In discussing the question whether the word "dues" in the Constitution and "debts" in the Compiled Laws of Kansas, covered this guaranty, and whether the shareholder could go behind the judgment rendered against the company upon such guaranty, the court said (p. 152):

"In *Schrader vs. Manufacturers' Nat. Bank*, 133 U. S. 67, 33 L. Ed. 564, 10 Sup. Ct. Rep. 238, *it was ruled* that,

although the individual liability of the stockholders of a national bank, as imposed by and expressed in the statute, was for all its contracts, debts and engagements, 'that must be restricted in its meaning to such contracts, debts, and engagements as have been duly contracted in the ordinary course of its business,' and that a judgment recovered against the bank in a suit commenced some years after it went into liquidation was not binding on the stockholders in the sense that it could not be re-examined."

This quotation was in point because it aided in defining the word "debts," and because the guaranty (while made by a going concern) was not made "in the ordinary course of its business," and because a shareholder of the company was seeking to go behind a judgment rendered against that company. If the quotation was not considered an authoritive definition by the Supreme Court of what Congress meant by Rev. Stats., Sec. 5151, why appeal to it? Three judges of the Supreme Court have, in the last eighteen years, (1887—1890—1902) used these same words to express what was meant by the words "contracts, debts and engagements" in section 5151. In the first two cases, it was necessary to decide that question, and in the third case the answer was recognized and adopted as an authoritative definition.

It is recognized as such in *Thompson on Corporations*, Sec. 3104, and in text books.

From these cases it appears, (1) that the liability imposed upon shareholders by Sec. 5151, Rev. Stats., is a *means* of securing the payment of a bank's debts *at the time* when it is no longer *able to continue business;* (2) that the *purpose* of the section is to secure the effectual *winding up* of the bank's affairs; (3) that such liabality *cannot be prolonged.* And it further appears, that there can be *no liability* on the part of shareholders, unless the contracts, debts or engagements have been contracted (1) duly, and (2) in the ordinary course of the bank's business. And it further appears that the fact, that

the new obligation *takes the place* of an old obligation for which the shareholders may have been liable, does not make them liable for such new obligation.

The "business of banking" was thus defined in *Mercantile Nat. Bank*, 121 U. S. 138 (1887), 30 Law. Ed. 895, while the court was passing upon the right of the states to tax capital invested in national banks:

> "The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand: in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans; and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital.'"

Nor is there anything peculiar in the rule that shareholders of national banks are liable only for contracts, debts and engagements duly contracted in the ordinary course of their business. It is simply the rule generally applied to other corporations. As said in *Central Trans. Co. vs. P. P. C. Co.*, 139 U. S. 24, 64 (1890), and often repeated, "the interest of the stockholders, not to be subjected to risks which they have never undertaken" is one of the reasons why contracts made by a corporation beyond the scope of its powers are unlawful and void. And as said in *Ward vs. Joslin*, 186 U. S. 142, 151, (1902), "Rights of stockholders must be considered as well as those of creditors, and they should not be held directly liable unless such liability was within their contract in legal contemplation."

Therefore, even if the American could be rightfully held liable for the *balance* remaining unpaid on the notes after its assets in the hands of the Union had been sold and applied

thereon, still the liability of its shareholders was so restricted by section 5151 as interpreted by the Supreme Court, that appellants were not liable individually for such balance. Because it was not, and coud not in the nature of things be, "the business of banking" (much less its ordinary course), for the officers of a bank to sell its good-will and means and place of business to another bank, no matter what the consideration may have been. Again, can it be said that it was in the "ordinary course" of the business of banking or in the "legal contemplation" of the shareholders of the American at the time they purchased the shares held by them, that the officers of the bank would assume the payment of the unearned and unpaid rental of an office formerly occupied by another bank; exchange furniture with another bank, assuming half the loss which might follow such exchange; "borrow" a sum larger than the capital stock of their own bank; issue non-negotiable notes therefor and agree to pay interest thereon for one, two and three years; turn over to such other bank for liquidation all the assets of their own bank; abdicate the offices to which they were elected; refuse to exercise the duties imposed upon them by law; and do all this without calling a meeting of the shareholders, but so secretly and quickly that no shareholder could have an opportunity to protest? It would be difficult, we submit, to conceive of an action which would be farther removed from the ordinary course of the business of banking, or which would be less probable to be in the contemplation of the shareholders of a bank, or would be a more complete abdication by officers and directors of their powers, or would be a more complete refusal to exercise the duties imposed upon and assumed by them as directors, or would more completely deprive the stockholders of all control over the property belonging to them, or would make it more impossible for them to restore things *in statu quo*.

Again, if this transaction is even of doubtful propriety under any section of the banking laws, can it be said to have been within the "legal contemplation" of the shareholders of the American or within the ordinary course of the business of banking as carried on in this country? If not, then we submit that these appellants are not liable and, more than that, that the Union, also a national bank, could not at the time it entered into the transaction, have thought them liable nor have placed any reliance upon their liability. But of this we shall speak again.

IV.

THAT APPELLANTS HAVE NOT DONE ANYTHING TO ESTOP THEM TO DENY THEIR LIABILITY TO MAKE GOOD THE BALANCE REMAINING UNPAID UPON THE NOTES.

The Circuit Court did not hold appellants liable upon the ground of express or implied ratification by them of the action of the officers and board of directors of the American, but the Court of Appeals said (Record, p. 399), "Every consideration of equity, good conscience and justice leads to the conclusion that the shareholders should be held to have ratified and approved of what was done and what was then being done." So that we must consider in some detail the evidence upon which the opinion (Record, p. 398) of that court was based. Ratification is sometimes implied from silence or from the acceptance of benefits, and in the last analysis is founded upon the doctrine of estoppel. But there is no such thing as a blanket estoppel covering the innocent and the guilty, equally and together. The Court of Appeals, however, did not draw any distinction between the shareholders of the American.

If we assume, *arguendo*, that a contract *ultra vires* a corporation *can* be rendered enforceable against its stockholders

by the principle of estoppel, then it becomes necessary to discover what each of these appellants did or failed to do in connection with the transaction. We have already summarized the bill, the amended bill and the answer, and have learned that the claim of estoppel, *first set out in the amended bill,* is based upon the alleged knowledge of the shareholders of the American of the proposed deal, and upon the alleged benefits received by them therefrom, and upon the alleged inducement to change its position offered by them to the Union. See Record, pp. 1-9 and pp. 24, 25 respectively.

The Court of Appeals did not, however, base it opinion upon the facts alleged in the amended bill as complainant's ground of estoppel. This appears in several ways. First, because that court made no distinction as to their liability between the various shareholders, although the complainant not only failed to prove (as he had alleged) that all of them had knowledge of the deal, but affirmatively proved that the great majority did not have such knowledge. Secondly, because the complainant's evidence failed to show any benefit received by any shareholder directly, or any benefit received indirectly, except a theoretical "incidental benefit" which turned out to be an actual disadvantage. Thirdly, because complainant affirmatively proved that none of the shareholders (unless, perhaps, we except Mr. Kimball and Mr. Baird) offered the Union any inducement to or persuaded it to enter into the Agreement. The Court of Appeals founds its opinion upon what occurred, or did not occur, *after* the Agreement was fully consummated.

Let us, then, first review what was actually done at the various meetings of the shareholders, so that the acts of each of these appellants may hereafter appear separately and distinctly.

But before examining the proceedings of the meetings it may be well to consider the claim made by complainant that

appellants Levy, Wyman and Smith occupied positions somewhat different than mere shareholders. It is true that Levy was a director of the American, but he had nothing to do with the negotiations leading up to the Agreement. It is also true that appellant Wyman was actively engaged in the transaction as cashier, but he was not a director nor had he any part in the negotiations; and what he did in signing the Agreement and notes was done as an employee of the bank and under the express directions of the Board of Directors. Appellees contend in their brief that as to appellant Smith, "the items of expense will show many fees paid to Mr. Smith for his services" for Kimball as trustee under the Agreement. This was a mistake. The Record, (p. 291,) does show payments to Smith, but the testimony of Mr. Burgess (Record, pp. 244, 245,) explains that the services were rendered to the American *prior* to Dec. 21, 1895, and were never paid in full.

To proceed with our review, the deal was made and closed on December 21-23, 1895, and the first meeting of the shareholders thereafter was the annual meeting of January 14, 1896. The notice of this meeting (pp. 254, 255) simply was to the effect that there would be brought before the meeting the question of amending the Articles of Incorporation. Apparently this is all that was intended to be brought before that meeting; but certain shareholders desired to know why the officers of the bank had made the deal with the Union. An explanation was given but *no action* whatever was taken by the shareholders present and *no effort made to have them approve the action of the officers* (Record, pp. 259-260). Appellants in their brief in the Court of Appeals says that the record recites the names of a large number of stockholders who expressed satisfaction at the action of the directors. There is no other evidence of this than the minutes of that meeting (which are incompetent), except the testimony of Mr. Baird, who confines himself to stating

what General Manderson said. But his approval, occurring after the event, does not indicate any intention of waiving any objection to the legality of the transaction or of extending his shareholders' liability beyond that provided in the U. S. Statutes. The shareholders present, however, were confronted by *the fact* that the bank had actually ceased doing business and passed this resolution (Record p. 261): "RESOLVED, that the directors of the American National Bank of Omaha, Nebraska, be and hereby are instructed to take action looking to the liquidation *required by law.*" There is here no recognition of the Agreement between the banks and no reference whatever to the liquidation of the assets which had been in the actual possession and control of the Union and Kimball for more than three weeks. Indeed, there could be no liquidation of *those* assets under sections 5220 and 5221 of the U. S. Revised Statutes even if they were in existence intact, except by getting them away from the Union; for as we have shown (p. 53, ante,) such liquidation is to be carried on under the direct supervision and direction of the directors of the bank. The vote of the shareholders present was in regard to "liquidation required by law," and evidently was intended to bring the corporation to an end lawfully, as its officers had brought it to an end in fact, but unlawfully.

At the next meeting of the shareholders, a special one, held on Feb. 25, 1896 (Record p. 264, Exhibit 14), the directors, under the authority conferred by the above resoultion, presented the following resolution, which was passed, to-wit: "RESOLVED, that the American National Bank of Omaha, Nebraska, be placed in voluntary liquidation under the provisions of sections 5220 and 5221, U. S. Revised Statutes, to take effect the 25th day of February, 1896, and that Thomas L. Kimball be and hereby is appointed agent and trustee of the shareholders of said bank to effect such liquidation." It is contended,

however, that these words in the latter resolution, "and that Thomas L. Kimball be and hereby is appointed agent and trustee of said bank to effect such liquidation" should be construed as an approval of the Agreement, although they were presented to the shareholders under the guise of carrying out the first resolution. We think this contention is erroneous, for several reasons. The first is, that the first resolution contained the words "liquidation required by law," and the second resolution contained the words "that the American.....be placed in voluntary liquidation under the provisions of sections 5220 and 5221, U. S. Revised Statutes.....and that Thomas L. Kimball be.....appointed.....to effect *such* liquidation." to-wit: the liquidation under such sections. But the laws of the United States recognize only two methods of liquidation, i. e., the voluntary liquidation under said sections, to be carried on under the direct supervision of the directors of the bank and the involuntary liquidation conducted by the Comptroller. The private liquidation by the Union and Kimball was, therefore, neither a liquidation "according to law" nor under said sections. The second reason is, that the "Certificate for Voluntary Liquidation" forwarded to the Comptroller (Record p. 267 and Exhibit 34, p. 307) expressly states that the liquadition is under said sections. Nor does the letter of the Comptroller (Record p. 269, Exhibit 18) dated April 27, 1896, nor does his "Certificate for Certified Copy" (Record p. 307, Exhibit 34) indicate his knowledge of or his purpose to approve any liquidation except one under said sections. Indeed, there is nothing in the record to show that the Comptroller knew the phrasing of the resolution appointing Kimball as agent. In the letter of the cashier of the American to the Comptroller dated April 23, 1896 (Record, p. 268, Exhibit 17) the writer, however, says: "Our directors have not yet received from you formal consent to the liquidation of this

bank in accordance with the decision reached by you in our interview of the fifteenth instant, and I have been instructed to ask of you such formal consent, in order that it may be incorporated in the bank's records." The evidence does not show what was said at that interview but we cannot *assume* that the Comptroller was informed of the Agreement between the two banks, because section 3 of the Act of June 30, 1876, is the only provision in the U. S. Banking Laws which authorizes the selection by the shareholders of a national bank of "an agent" to liquidate the affairs of such a bank; and by that section the appointment of an agent must be preceded by and based upon the condition that all the creditors of the bank had been paid in full. But according to the theory of appellees, the debts of the American had not been paid, i. e., instead of owing various debts to various creditors, it now owed but one debt to one creditor—the Union. Not only this, but under the Agreement between the American and the Union the obligations of the American had been actually increased, not diminished. Yet under the provisions of the Act of June 30, 1876, the Comptroller ought not to and, of course, would not have consented to the appointment of "an agent" by the shareholders, unless he was ignorant of the Agreement or had concluded that by it all the debts of the American had been paid and that all the agent had to do was to collect and distribute any assets, which might thereafter be returned into the possession of the American. Appellees cannot, therefore, argue that the transaction was approved by the Comptroller. Although, of course, his approval of an *ultra vires* act would not make it *intra vires*.

But to proceed—On January 12, 1897, at the next annual meeting of the shareholders, a report (Exhibit 24, p. 274) was read showing the condition of the assets which had been transferred to the Union to be liquidated and was intended to show the progress of that liquidation, (Wyman, p. 178). It was or-

dered spread upon the records but *was not approved.* It simply showed that nothing had yet come into Kimball's hands as "agent."

Having reviewed the meetings of the shareholders let us see at which meetings these verious appellants were present.

Of the appellants in No. 19,652, Wyman and Levy, and of the appellants in No. 19,653, Frenzer, Wallace and Smith, there were present at the three meetings above mentioned the following, to-wit: On January 14, 1896, Levy, Wyman and Wallace personally and Frenzer by proxy. On February 25, 1896, Levy, Wyman, Wallace and Smith. On January 12, 1897, Wyman and Wallace.

We have shown that nothing was done at any meeting which could be fairly construed to be an *affirmative* endorsement of the transaction, nor is there any evidence that the Union National had any knowledge of what took place or in any manner whatever *relied* thereon, *so as to change its position upon the faith thereof.* But the Court of Appeals said, (p. 399): "When it is considered that the Union National was engaged in carrying out its part of the contract, was disbursing its funds in taking up and caring for the contracts, debts and engagements of the American National, the duty of the shareholders of the latter in a meeting assembled, to *then repudiate the transaction,* if they ever desired to do so, was imperative."

These words would seem to limit the necessity of repudiation to the *first* meeting of the shareholders held on Jan. 14, 1896, and to those *then present.* But what was the status of affairs on that day? The appellees on p. 54 of their brief filed in the Court of Appeals say: "We cannot tell how much the Union National had paid on Dec. 23. It may have paid one hundred thousand dollars or it may have paid less; that is immaterial, but the material thing is that the Union National, a

solvent, reliable bank, *had become liable to pay over two hundred thousand of obligations*, and the American National was released and discharged to that extent." The evidence is that one hundred depositors called on Monday, Dec. 23rd and received cash or new pass books from the Union National (Record, p. 184); that most of these depositors, so far as amounts were concerned, had, immediately after Dec. 23rd, consented to be and thereby became depositors of the Union (Record, p. 194); and that the Union had paid out in thirty days about one hundred and fifty thousand cash (Record, p. 196.) The failure to prove the exact status of affairs on Jan. 14, 1896, was the failure of complainant, and he and the Union were the only parties who had the *data*. Enough appears, however, to show that the Union had *before* that date either paid or agreed with third persons to pay practically *the whole amount* it had assumed in the Agreement. There is not the slightest evidence, however, that any one of the shareholders present at that meeting (except those officers directly engaged in the transaction) knew how much or how little the Union had paid out under the Agreement, or how far it had committed itself to third persons. Apparently it had done all it agreed to do, or the officers of the American could not honestly have kept silent before the shareholders then present. The officers of the Union gave the shareholders of the American no information. It is not equitable to permit such officers of the Union to remain silent and then charge those shareholders of the American present at that meeting with knowledge which they did not possess. "Repudiation," as far as those shareholders had knowledge, would have been an absolutely useless formula.

But even were the facts otherwise, was it the duty of the shareholders then present "to repudiate" the transaction? A transaction may be repudiated (1) by word or (2) by act. As to the first, the Court of Appeals says in effect that such of the

appellants as were present (for the notices calling the various meetings did not mention the transaction) were silent when they ought to have spoken. But does the rule apply, when to speak would simply be to give voice to one's surprise and disappointment at something *irretrievably* consummated? It seems inequitable to permit the Union to consummate a deal with the officers of the American, which it knew ought (if legal under any circumstances) to be submitted to the shareholders of the American and to the Comptroller for approval before consummation, and then to say that the individual shareholders of the American should make some formal complaint or be concluded thereby and become *individually* liable therefor.

But equity does not require a vain thing; and what good would a protest have done the Union or the shareholders of the American, and if it would have done no good, why should it have been made? The transaction was a secret one and was fully consummated before the great majority of the shareholders of the American had knowledge thereof, and they were from the *peculiar nature of the case* without remedy. It is inconceivable to us that a protest could have done any good to any one of them, whether made collectively or individually. As to the second, what action could have brought them any relief whatever? If the Union by any conceivable process of law or otherwise, could have been promptly driven out from the offices of the American and the American could have been replaced in possession of its place of business, together with its books and its diminished assets, it would not have been a bank in operation. But the fact that a bank is in full operation gives to their stock therein its principal value to the shareholders, i. e., its income producing feature. For the shareholders of a bank out of business simply own *choses in action* awaiting upon its liquidation. But even if reopened, the American would have been a bank under suspicion and without depositors, and to no busi-

ress is the confidence of the public so essential as it is to banking, and a bank without depositors is but a name.

Nor, on the other hand, would an attempt by the shareholders of the American to regain possession of its offices, assets and good-will and to put it on its feet again, have been of any conceivable benefit to the Union. Such an attempt was not practicable, of course, because (among other reasons) the Union had already appropriated the cash and cash assets of the American. But the mere attempt would have been disastrous to the Union. For that bank had already vacated its former place of business and would unquestionably have been confronted with a run and would, also, have ben compelled to wait for the liquidation of the American by the Comptroller before it could have recovered the amount it had expended in carrying out the Agreement.

Nor would a mere protest by any one or all of the shareholders of the American have been of any benefit to the Union, for it, on the one hand, had already changed its location and assumed all its obligations to third parties under the Agreement and could not evade or escape from them; and, on the other hand, had obtained *all* the assets of the American so that it could take no other steps or means to secure itself farther.

The bald fact is, that a mere protest on the part of the shareholders of the American would have done no good and any action in any court on their part against the Union, would have brought disaster to the Union and no further relief to them.

But the Court of Appeals says (Record, p. 398), "Shortly after the execution of the contract of December 21, 1895, and before the adoption of the resolution for liquidation a writing containing an express ratification of the action of the directors in respect to the contract between the two banks was executed by the owners of more than two-thirds of the stock of the American National." This writing should not, of course, in equity

bind those shareholders who did not sign it, nor should it have the slightest effect upon the question of their individual liability as shareholders. It was not signed by either appellant Frenzer or appellant Smith. It is marked Exhibit 25 (Record, p. 227) and is as follows: "The undersigned, owners of the number of shares of the Capital Stock of the American National Bank of Omaha, set opposite our respective names, hereby ratify and confirm the action of the directors of the American National Bank of Omaha, in entering into and executing a certain Agreement between said American National Bank and the Union National Bank of Omaha, a copy of which Agreement is hereto attached."

The Court of Appeals seems to have reasoned, first, that because Section 5220 of the United States Revised Statutes authorizes two-thirds of the shareholders of a national bank to go into voluntary liquidation, therefore *a vote* of two-thirds would also authorize the directors to enter into the Agreement; and second, that as a consequence, a ratification (assuming there was one) by two-thirds of the shareholders *acting individually* would bind those who did not ratify. But these assumptions are not well grounded. At common law, *all* the shareholders must unite in order to authorize a voluntary winding up of a corporation. It follows, then, that Section 5220 makes an *exception* and gives three-fourths of the shareholders a power not otherwise possessed; and a special grant of power cannot be extended beyond the terms of the grant. Again, it is well established that the power of stockholders to manage the affairs of a corporation and to bind it and their fellow stockholders by their action, is vested in them *collectively as a body in meeting assembled.* It follows, then, that this instrument was not a ratification *at law* and was not binding upon the American National--the corporation—and could not invest the transaction with any legality which it did not *ipso facto* pos-

sess. Nor could it *in equity* affect the rights of the corporation or of those shareholders who did not sign, which rights came into being and became vested immediately upon the execution of the Agreement and the delivery of the assets and notes in accordance with its terms on December 21-23, 1895. The signers acted as individuals and as such only can be judged.

Let us, then, first inquire when and why this paper was signed. It shows on its face that it was signed some time *after* the transaction in question. Two witnesses testified in regard to it. Mr. Wattles says (Record, p. 242) that he first saw it a day or two before the meeting of the stockholders of the American, which meeting was held, he thinks, February 26, 1896; that it was gotten up by Mr. Kimball, president of the American, without consulting him; that it was shown him because (p. 243) he had asked Mr. Kimball regarding the probability of a favorite vote to liquidate the American and as evidence that the vote would be favorable; and that he thought (without having any personal knowledge) it was signed during the next week or ten days after the transfer was made. Mr. Wyman (p. 174) said on cress examination that he thought it was signed after January 1, 1896. This fact is patent, that it could not have been an *inducement* to the Union to enter into or complete the transaction, for that was done on December 21-23, 1895. It is evident also, that the paper was gotten up and circulated *without any reference* to the Union or Mr. Wattles would have known about it. It probably had its origin in the desire of Mr. Kimball to protect himself and the other officers, who had acted with him and under his advice. But whatever his motive, the paper shows on its face that it was not intended to have and it does not in fact, have any *reference to the shareholders or to their liability as such.* Nor was it so considered by Mr. Wattles. Indeed, according to the evidence all those engaged in the transaction on both sides were then of the opinion that the as-

sets of the American were abundant to pay and more than pay all its liabilities. Neither the Unior nor its friends in the American, nor those shareholders of the American who were persuaded to sign, anticipated any necessity for looking beyond the assets held by the Union. Even Mr. Wattles, the active officer of the Union, paid no attention whatever to the liquidation until about December, 1896. See his testimony, Record, p. 247 and 249. To hold this paper evidence of an intent to bind themselves individually or to hold that it had any effect in that direction, would be to ingraft into it a purpose and meaning it did not have in the minds of any person directly or indirectly interested in the transaction of Dec. 21-23, 1895. It was not until later, when doubt arose as to the sufficiency of the assets of the American, that the thought occurred that possibly the shareholders might still be liable, because of this writing, notwithstanding the non-negotiability of the notes given by the American to the Union and the nature of the transaction.

All of the meetings aforesaid occurred *long after* the business and assets of the American had been actually transferred to the Union and long after the Union had taken actual possession of the books, the assets and the offices of the American. This was true also of the signing of the aforesaid Exhibit 25. All of these things transpired and all of these acts were done long after the consummation of the transaction between the American and the Union, which had occurred on Dec. 21-23, 1895. Neither at these meetings nor in the writing aforesaid, was there anything *to direct the attention* of the shareholders to the question of their personal liability as shareholders. In nothing that they did and in nothing that they heard and in nothing that they signed, was there any intimation on behalf of the Union or its friends, that it expected the stockholders of the American to make good the transaction of Dec. 21st, if there should unexpectedly happen to be a deficit arising therefrom.

In no respect and at no time had the Union been *induced to act* upon the assumption that it might in the case of necessity look to the shareholders of the American. If they have received any benefit from the transaction, it has been without any action on their part. But they have received no benefit. A judgment against them of $97.23 per share of $100.00 shows this conclusively. If the directors had submitted the matter to the Comptroller and he had required the shareholders to make good the *whole* Capital Stock, the shareholders would have paid only $2.77 per $100.00 more than they have been adjudged to pay by the Circuit Court, and would have had *all* of the assets of the American on hand to make them good. The fact that the American may have received (although in fact, it did not receive) some benefit, does not affect them; just as the fact that the *Western I. L. & T. Co.* had received a valuable consideration for its *ultra vires* guaranty and that incidentally its shareholders may have been benefited thereby, did not affect the question of the liability of the stockholders in that company in the case of *Ward vs. Joslin ante.* These appellants did not act *in their capacity of shareholders* at any time or in any way so as to bind themselves as such or to lead the Union to rely upon their statutory liability as such.

Scovil vs. Thayer, 105 U. S. 143 (1882), 26 Law. Ed. 968, was an action by an assignee in bankruptcy of the Fort Scott Coal and Mining Co. to recover, for the benefit of creditors of that company, against Thayer as a shareholder therein upon the third and fourth issues of stock which the court held to be void for the reason that the corporation had no implied power to change the amount of its capital as prescribed in its charter. The court says (p. 149):

> "It is insisted, however, that the defendant in error having attended by proxy the meetings at which the increase of the stock of the company beyond the limit im-

posed by law was voted for, and having received certificates for the stock thus voted for, and after such increase the company, by its agents having held itself out as possessing a capital of $400,000, and invited and obtained credit on the faith of such representations, he is now estopped from denying the validity of the stock and his obligation to pay for it in full."

And concludes (p. 151) after examining cases:

"Upon the principles stated in these authorities, we are of the opinion that the defendant in error is not estopped by any acts of his, to assert the invalidity of the stock issued, in excess of the limit authorized by the charter, and *deny his liability thereon.*"

In *Thomas vs. West Jersey R. R. Co.*, 101 U. S. 71 (1880), 25 Law. Ed. 950, Thomas and others had entered into a contract with the railroad company, which had been confirmed *by a vote* of its stockholders and which contained a provision for arbitration in the event of its termination as therein provided. The company terminated the contract but refused to arbitrate. Thomas, *et al.* then sued the corporation for damages. The court held the contract *ultra vires* and no recovery could be had, saying (p. 86):

"But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely: the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action; damages for a material part of the contract never performed; damages for the value of the contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its non-performance. As to this, it is not an executed contract."

In the case at bar, the Agreement has been executed except

the payment of the balance remaining unpaid upon the notes and for this balance judgment is asked. Even part performance and the formal vote (which, of course, there never was) of its shareholders could not validate such an Agreement or the notes issued thereunder even as against the American.

In *Bloomfield vs. Charter Oak Nat'l Bank*, 121 U. S., 121, 135 (1887), 30 Law. Ed. 923, the court said: "And no estoppel *in pais* can be created, *except* by conduct which the person setting up the estoppel has the *right* to rely upon, and *does in fact* rely and act upon."

It was held in *Mutual L. Ins. Co. vs. Mowry*, 96 U. S. 544, 547 (1878), 24 Law. Ed. 674, that "The *only* case in which a representation *as to the future* can be held to operate as an estoppel is where it relates to an *intended abandonment* of an *existing* right, and is made to *influence others*, and by which they *have been induced to act*."

In this connection and as bearing upon the questions of estoppel and ratification the Record shows the following:

First, that complainant is the *assignee* of a *non-negotiable* instrument, which was transferred to him *after maturity* and for the *sole purpose* of enabling him to bring this action; that he personally never had any dealings with, or occupied any relation to, the American or its shareholders; that he has neither done nor suffered anything by reason of any acts, or failure to act, of the American or its officers or its shareholders; that he simply stands in the shoes of the Union, having no other rights than it can have and being chargeable with notice of what the Union knew and did.

Second, that complainant came into court and asked its assistance to *execute further* the Agreement between the American and the Union by liquidating the assets remaining unliquidated by the Union, by applying the proceeds, and by rend-

ering and enforcing a judgment against these appellants for any deficit left unpaid upon the note so assigned to him.

Third, that appellants are not asking any *affirmative* relief against any one or anything, but are simply defending themselves against a judgment for a deficiency based upon an alleged claim against the American for which they insist they are not responsible or liable.

Ever since Monday, December 23, 1895, when the Union opened its doors to the depositors of the American with their names on its books and the American's assets in its control, the shareholders of the American have been helpless in fact, whatever theoretical rights they may have had. At no time since that morning, have they stood on equal ground with the Union. It is not right to apply the same standards of conduct to the helpless that we apply to those who are free to choose what they shall or shall not do. When appellees came into a court of equity and asked *affirmative* relief, they should have been met with the maxim which underlies the whole of equity jurisprudence, "He who comes into equity must come with clean hands." Nor would the result of this maxim result in injustice. The Union, on the other hand, has secured the only objects it had in view—the business and good-will of the American. It is true, it has paid more therefor than it had intended to pay. But the shareholders of the American are not even morally responsible for that. They made no representations to the Union. What the results of that transaction were, on the other hand, as they affected the interests and rights of the shareholders of the American, we have hereinbefore set forth on page 44 et seq. and need not repeat them.

The Union was an active and necessary party in that transaction, and is responsible for the results thereof. Even if the American had been unable to continue business (which is very doubtful), the Union for its own purposes and for its own gain

interfered with the method of liquidation provided by law and deprived the shareholders of a vested right to have their individual liability for each claim determined in the manner provided by the banking laws of the United States, and subjected them to delay, expense and loss which they never contemplated when they became shareholders. Equity cannot replace the shareholders of the American *in statu quo* they stood before December 21-23, 1895. But equity should not, in effect, put the Union in the shoes of the creditors of the American then existing, unless it can also place its shareholders in the position they then occupied and give them the rights they then had; which were, among others, to decide whether to assess themselves if necessary to continue in business, or to enter upon liquidation in one of the two ways provided by the laws under which they were organized. We contend that *at the moment* the transfer was made and the notes delivered, the question of the liability of the shareholders was determined and settled forever, unless they thereafter did something intentionally to impose upon themselves a *new* liability—a new *contractual* liability in lieu of their *statutory* liability. And that none of them ever did.

But even if the transaction was intra vires or being ultra vires was capable of being made *intra vires* by ratification or estoppel, still the nature of the transaction was such (being far outside of the ordinary course of the business of banking) and the liability of the shareholders of national banks is so restricted (as shown on page 64 et seq. *ante*), that these appellants should not have been held liable for a deficiency arising therefrom. Ratification or estoppel cannot change the *nature* of the transaction. Either might, according to some authorities, have prevented any particular shareholder, so situated, from *interfering* with the Union and Kimball in the management and application of the assets in their control, but would not have imposed upon such shareholder any liability not imposed by Sec. 5151 Revised Statutes.

But the tacit assumption by the Court of Appeals and our previous assumption, *arguendo,* that a contract *ultra vires* a corporation can be rendered enforceable against its shareholders by ratification or estoppel, seems to be directly contrary to the opinions of the Supreme Court.

In *First Nat. Bank of Conrad,* 174 U. S. 364, 372 (1899), 43 Law. Ed. 1007, the court after holding that a national bank is *impliedly* prohibited from acquiring and holding the stock of another national bank as an investment and also that *the bank itself* is not estopped to set up that defense and that such transaction being void cannot be confirmed or ratified, says (p. 372):

> "If the previous reasoning be sound, whereby the conclusion was reached that, by reason of the limitations and provisions of the national banking statutes, it is not competent for an association organized thereunder to take upon itself, for investment, ownership of such stock, no intention can be reasonably imputed to Congress to *subject the stockholders* and creditors thereof, for whose protection those limitations and provisions were designed, to the same liability by reason of a void act on the part of the officers of the bank, as would have resulted from a lawful act."

Ward vs. Joslin, 186 U. S. (1902) was an action to enforce the *statutory liability* of a shareholder in a Kansas corporation just as this is an action to enforce the liability of shareholders under Sec. 5151 of the U. S. Revised Statutes. The Kansas corporation had guaranteed in writing the payment of certain notes (p. 143), which guarantees were given without authority (p. 149.) In the case at bar, the attempt is to secure judgment for the balance remaining unpaid upon notes issued by the American. In an action so alike in form and affecting persons holding positions so nearly identical, it would seem that these words (p. 151) of the Supreme Court would be decisive.

> "*The rule of this court is* that a contract made by a corporation beyond the scope of its powers, *expressed or*

implied, cannot be enforced, or rendered enforceable, by the aplication of the principle of estoppel."

See also cases heretofore cited.

The Court of Appeals finally says (Record, p. 400): "In equity the claims of the complainant and the Union National represent the contracts, debts and engagements of the American National for which the stockholders of the latter are responsible in accordance with the provisions of section 5151 of the Revised Statutes."

1. This conclusion is not based upon any averment in the bill or the amended bill.

2. We have already, after reviewing and analyzing *Richmond vs. Irons, Schrader vs. Mfgrs.' Nat'l Bank, and Ward vs. Joslin*, stated as a conclusion therefrom on page 68 *ante*: "And it further appears that the fact that the new obligation *takes the place* of an old obligation for which the shareholders may have been liable, does not make them liable for such new obligation."

3. The evidence does not show that all claims against the American, which were paid off or were assumed by the Union, were claims for which the stockholders of the American would have been liable We may assume they were such, but we cannot know they were such from the evidence.

4. Even if the payment or assumption of the debts of the American by the Union was all there was to the transaction, the doctrine of subrogation would not apply. For there was an entirely *new* deal and the Union did not buy the claims of the creditors of the American in fact or by implication. One who is under no prior obligation to pay the debts of another, or one who does not pay off the debts of another for the purpose of protecting a lien theretofore held by him against the property of that other, is held to be a volunteer, and one who

voluntarily pays the debts of another is not subrogated to the rights of the creditors thus paid off.

In *Aetna Life Ins. Co. vs. Middleport*, 124 U. S. 534 (1888), 31 Law, Ed. 537, the court says on p. 547:

> "One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor; that, being enforced under such circumstances to pay off the debt of a creditor who had some superior lien or right to his own, he could, for that reason, be subrogated to such rights as the creditor, whose debt he had paid, had against the original debtor."

The court says further on p. 549:

> "In *Gadsden vs. Brown*, Speer's Eq. (S. C.) 37, 41, Chancellor Johnson says: 'The doctrine of equity is a pure, unmixed equity, having its foundation in the principles of natural justice, and from its very nature could never have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound; and, so far as I have been able to learn its history, it has never been so applied. If one with a perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound who could not chose to abide the penalty.'
>
> This is perhaps as clear a statement of the doctrine on this subject as is to be found anywhere."

And the court thus concludes on p. 551:

> "No case to the contrary has been shown by the researches of plaintiff in error, nor have we been able to find anything contravening these principles in our own investigation of the subject."

The conclusion seems to be (1) that the nature of the transaction, of which the three notes were a part, was such and the statutory liability of the shareholders in national banks is so restricted, that appellants are not liable under the Statutes for the balance unpaid upon the notes; and, (2) that appellants have not done anything (even if they could have done anything) to change their individual statutory liability into an individual contractual liability. Nor does this conclusion lead to unjust results.

The American and the Union were both national banks and were organized and doing business under the same laws . Their officers actually knew, as well as were chargeable with knowledge of, the limitations fixed by law upon the powers of both banks. They actually knew the purpose, the nature and the possible results of the transaction in which they engaged. The officers of the Union relied upon the belief, then entertained strongly, as shown by the evidence, that the assets of the American, which were transferred to the Union, were amply sufficient to justify it, as a business venture, *in buying out a rival and acquiring its good will.* Years after the transaction, when the status of all the parties has been irrevocably and materially changed, complainant brings this action to compel the shareholders of the American to make good the loss unfortunately sustained,—but sustained largely by reason of the method of liquidation adopted and the management of those assets. This, it is respectfully submitted, they should not be required to do.

Howard B. Lamb
Westel W. Moorman

Solicitor and of Counsel for Appellants.

January, 1906.

APPENDIX.

EXHIBIT A.

(Italics are mine.)

This Indenture Witnesseth—That the American National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the first part, has and by these presents does hereby agree for the consideration hereinafter expressed to and with said Union National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the second part, as follows, to-wit:

First. The party of the first part hereby agrees to sell and assign and *does hereby sell and assign* to the party of the second part the *business* of the party of the first part, its *cash on hand, office furniture* and *fixtures* and such *of its bill receivable* as the party of the second part on examination may be willing to take as cash without recourse on the party of the first part.

Second. The party of the second part hereby agrees to purchase and does hereby purchase from the party of the first part the business of the party of the first part, cash on hand, office furniture and fixtures, and such bills receivable as the party of the second part may be willing to take as cash on examination of the same without recourse on the party of the first part and to pay the party of the first part for said office furniture and fixtures the sum of three thousand seven hundred and fifty ($3,750.00) and to assume the liabilities of the party of the first part to its depositors and on account of its bills payable and *to liquidate* the remaining assets of the party of the first part which may not be taken and received as cash by the party

of the second part, without charge or expense to the party of the first part, except such court charges and attorney's fee's as may be found necessary, and that such liquidation shall be conducted *under the direction* of Thomas L. Kimball or such other person as may be agreed upon on behalf of the stockholders of the party of the first part, it being understood and agreed that said Kimball or his successor shall represent in said liquidation the stockholders of the party of the first part, and shall receive, hold and use the proceeds of the assets of the party of the first part as trustee of the parties hereto for the mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary court charges and attorney's fees attending said liquidation shall be incurred under the direction of the said Kimball, or his successor.

Third. In consideration of the above agreement of the party of the second part, the party of the first part hereby agrees to *sustain and pay* one-half of the loss and expense which the party of the second part may sustain on acount of the removal from its present quarters by reason of its unexpired lease on its present place of business, and one-half of the loss which the party of the second part may sustain on the sale of its office furniture and fixtures, which furniture and fixtures are agreed upon at the present price and value of three thousand seven hundred and fifty ($3,750.00) dollars, and the party of the first part further agrees to guarantee and *does hereby guarantee* the party of the second part against any and all loss on account of assuming the liabilities of the party of the first part as aforesaid. *And to this* end the party of the first part agrees to execute and deliver to the party of the second part its three promissory notes of equal sums for the amount of liabilities which the party of the second part may assume after crediting the full amount of cash on hand and bills receivable and other assets which may be accepted by the party of the second

part or examination, which notes shall draw interest from date at the rate of six per cent. per annum, payable quarterly annually, and be payable in one, two and three years from date, respectively, and shall be non-negotiable. And in case of nonpayment of any of said notes when due the whole of said principal sums of all of said notes and accrued interest shall thereupon become due. And as further security to the party of the second part the party of the first part agrees to sell and assign and *does hereby sell and assign* to the party of the second part *all* of its assets which may remain *after the selection* therefrom by the party of the second part heretofore mentioned, including all its bills receivable, stocks, *bonds*, personal property of every kind and all real estate and rights and interests therein or liens thereon with the understanding and agreement that the party of the second part shall have and hold said assets and properties subject to the right of said Thomas L. Kimball, or his successor, to collect and convert the same into cash for the uses and purposes hereinbefore expressed.

And it is further agreed that the party of the first part may pay and have credited on said notes at any time prior to maturity any sums of money of five hundred ($500.00) dollars and upwards, provided the sums so paid shall be in even hundreds.

Witness the names and corporate seals of the parties hereto this 21st day of December, A. D. 1895.

EXHIBIT B.

Sect. 14, Art. XVI of Constitution—"The terms of office of all state and county officers * * * * * shall begin on the first Thursday after the first Tuesday in January next succeeding their election * * * * *" If an election took place in 1895, then the new state and county treasurers would have assumed the duties of office on January 9, 1896.

EXHIBIT C.

Section 11 of Charter of Omaha—"The officers to be elected • • • • shall be a mayor • • • treasurer • • • and shall • • • • hold office • • • • • commencing on the first Tuesday in January succeeding such election • • •." This was January 6, 1896, if an election took place in 1895.

Term No. 193.
General No. 19654.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1905.

EDGAR M. MORSMAN,
Appellant,

vs.

SUMNER WALLACE, ET AL,
Appellees.

ARGUMENT FOR APPELLANT.

Appeal, From The United States Circuit Court Of Appeals For The Eighth Circuit.

W. W. MORSMAN,
For Appellant.

STATEMENT OF FACTS.

The appellant, Edgar M. Morsman, is the owner of 75 shares of the capital stock of the American National Bank of Omaha, Nebraska, and the decree appealed from affirms a decree of the Circuit Court for the District of Nebraska, which subjects him (and other shareholders) to individual liability, under Revised Statutes, Sec. 5151, for alleged debts of the bank, which appellant claims are not such obligations as the statute makes shareholders individually liable for. (Record, pp. 130-137-139).

Prior to and on the 21st day of December, 1895, the American National Bank and the Union National Bank, of Omaha, were each domiciled in the State of Nebraska, doing business in Omaha, and a citizen of that state. At that date the American National Bank was embarrassed, and there was an agreement in writing entered into between the two banks.

The *Board of Directors* of the American National, at a special meeting, adopted a resolution authorizing its officers to execute and carry out an agreement which recited the following:

"Whereas, the officers of this bank and the officers of the Union National Bank of Omaha, Nebraska, have negotiated and agreed upon the *sale* by this bank to the Union National Bank, of the busines and assets of this bank, on the terms and conditions embodied in the agreement of which the following is a copy, to-wit:

(Here follows a copy of the agreement. See Exhibit 7, Record, p. 255.)

By the agreement, the American National undertook to obligate itself as follows:

(1) To sell and assign to the Union National Bank its business, its cash on hand and cash items, its office furniture and fixtures and such of its bill receivable as the Union National should accept as cash and without recourse;

(2) To sustain and pay one half of the loss which should be sustained by the Union National by reason of its removal from its then place of business to the offices occupied by the American National on account of the unexpired term of the lease of the premises then occupied by it, and one half of the loss which the Union National should sustain in the sale of its own furniture and fixtures, the value of which was fixed at $3750.00.

(3) To *guarantee* the Union National against all loss on account of its assumption of the debts of the American National to its depositors and for bills payable, and in the execution of such guaranty ("and to this end" is the language used), to make and deliver to the Union National its three promissory notes in equal sums, in the aggregate equal to the sum of the liabilities of the American National assumed by the Union National in excess of the cash and other assets accepted as cash by the Union National; such notes to draw interest, to mature in one, two and three years, respectively, to be non-negotiable, and all to become due on non-payment of any one when due; and, "as further security", to sell to the Union National (the words are: "agrees to sell and assign, and does hereby sell and assign") *all* of its remaining assets, bills receivable, stocks, bonds, personal property, real estate, rights and interests therein, or liens thereon, with the understanding and agreement that the Union National Bank should have and hold said assets and property subject to the right of T. L. Kimball, or his successor, to collect and convert the same into cash for the purposes set forth in the contract.

The Union National undertook to bind itself:

(1) To take the furniture and fixtures of the American National at the sum of $3750.00, and to purchase (the words are: "agrees to purchase and does hereby purchase") the business, cash on hand, and such bills receivable of the American National as it (the Union National) should be willing to take as cash and without recourse;

(2) To assume all of the liabilities of the American National, to its depositors and on account of its bills payable;

(3) To liquidate the remainder of the assets of the American National (exclusive of the portion taken as cash) without any charge or expense therefor, except such court charges and attorney's fees as might be found necessary;

(4) That such liquidation should be conducted under the direction of Thomas L. Kimball (or such other person as should be agreed upon) on behalf of the stockholders of the American National, and that Kimball should represent the stockholders of the American National in snch liquidation, and receive, hold and use, the *proceeds* of such assets, as trustee, for both parties, and for the mutual protection of the rights of each, and that all necessary charges and attorney's fees attending such liquidation should be incurred under the direction of Kimball, or his successor. (Exhibit 1, Record p. 250).

The obligations of the parties are not set forth in the same order in the agreement, but the above is a correct analysis and orderly arrangement of them.

The agreement was executed Saturday evening, and on Monday morning the Union National had moved into the offices theretofore occupied by the American National, and the depositors balances were transferred from the books of the American National to the books of the Union National, to be paid by the latter as demanded in the course of business. The bills payable indebtedness of the American National was afterwards paid, and the Union National received all of the assets of the American National, which included cash and cash items, amounting to the sum of $46,167.79. None of the bills receivable of the American National were at the time taken as cash by the Union National, but it was found (December 23, 1895), that the liabilities assumed by the Union National exceeded the amount of assets

taken as cash, by the sum of $240,929.51, and thereupon, Thomas L. Kimball, as President, and Henry Wyman, as Cashier, executed in the name of the American National, three promissory notes, so-called, for the sum of $67,000.00 each, dated December 23, 1895, payable to the Union National, in the terms provided for in the agreement. (Record, pp. 252-3). They also gave to the Union National a "Cashier's Check" for $39,929.51. The three notes and the cashier's check, it will be observed, aggregate the sum of 240,929.51, the amount of the indebtedness which the Union National had assumed the payment of, in excess of the assets taken by it as cash.

The so-called Cashier's check was given as a matter of convenience, the parties not having, at the time, determined whether or not any of the bills receivable of the American National would be accepted by the Union National as cash.

Thomas L. Kimball retained a desk in the office room of which the Union National had taken possession pursuant to the agreement, employed Henry Wyman to assist him (p. 175) and proceeded with the liquidation of the "remaining" assets of the American National, which the Union National had taken and had agreed to liquidate without expense to the American National.

The Cashier's check for $39,929.51 was soon paid, partially by accepting bills receivable as cash, and the remainder in the course of the liquidation of the assets taken by the Union National for that purpose, which left $201,000 of the sum assumed by the Union National to be gotten out of the remaining assets, and which the American National by the agreement of December 21, 1895, guaranteed would be realized; that is, it guaranteed the Union National against loss. This sum of

$201,000 was represented by the three notes for $67,000 each, and is the alleged indebtedness of the American National for which it is sought, in this suit, to charge the shareholders individually.

The face, or book value of the remaining assets, was $451,731.03. The liquidation of them was conducted with such lack of judgment that, at the time of the filing of the bill, three years after the transfer to the Union National for liquidation, $371,765.00 remained unliquidated, and when finally sold, under the decretal order of the Circuit Court in this case, November 25, 1902, seven years after the transfer, after applying the proceeds, there remained unpaid (according to the final decree) of the three notes for $67,000.00 each, the sum of $194,466,36; that is to say: This liquidation of assets of the face value of $451,731.03, and which all parties believed to be more than sufficient to pay the three notes amounting to $201,000.00, in fact paid but $6,553.65 of the principal sum.

It is not material to the errors relied on to trace out in detail the disposition of the money actually collected in the course of that liquidation; but the record shows that at the time of taking the testimony there had been collected in cash, the sum of $127,744.15 (pp. 227-289), to which must be added the sum of $14,380.00 realized afterwards and before final decree (p. 125,) making the total cash realized $142,126.16; out of which, but $6,533.65 was paid on the principal sum of $201,000.00. The remainder of this large amount of cash realized was absorbed in the course of this protracted and obviously wasteful liquidation—wasteful, because it was conducted without discretion or judgment—which the Union National bound itself to do "without charge or expense" to the American National.

On February 25, 1896, at a special meeting of the stockholders of the American National, called for the purpose two months after the transfer of all the assets to the Union National pursuant to the agreement of December 21, 1895, a vote was had and a resolution was adopted, to place the Bank in liqudation under Revised Statutes Sections 5220 and 5221, and such further proceedings were taken as would have constituted a compliance with those sections, but for the agreement of December 21, 1895; but the American National did not, after, December, 21, 1895, have the control of or convert any of its assets.

The Union National transferred, on August 8, 1898 (p. 23), one of the three notes for $67,000.00 to the plaintiff, a citizen of New Hampshire, who filed the original bill against the American National and all of its shareholders, on August 18, 1899. The two remaining notes were retained by the Union National, which was also made a defendant.

Thomas L. Kimball was also made a defendant, and it was alleged that he held the remaining assets of the American National as trustee, to secure the payment of the three notes of $67,000.00 each, and that an accounting and decree for the sale of these remaining assets, was necessary.

Kimball died before final decree, and the circuit court, on the application of plaintiff, appointed James Burness his successor (p. 17).

An amended bill was filed February 17, 1900 (p.18). Plaintiff alleged that his suit was brought on behalf of himself and all other creditors of the American National, but it was not claimed there were any other creditors, excepting the Union National, holder of the two remaining notes for $67,000.00 each.

The plaintiff sought, by this amended bill, a decree ascertaining the amount due on the note held by him, and on the two notes held by the Union National; the enforcement of his lien upon the remaining assets of the American National, by a sale of them and application of the proceeds to the payment of the three notes for $67,000.00 each, and several judgments against the shareholders individually to make up any deficiency that should be found. So far, therefore, as the appellant is concerned, the suit is one to charge him with the payment of a pro rata proportion of the amount of the three notes remaining unpaid after sale and application of the proceeds of the remaining assets of the American National, as a debt of the American National for which shareholders are made liable by Revised Statutes, Sec. 5151.

It was alleged in the amended bill, that the American National had gone into voluntary liquidation under R. S. Sec. 5220, on the 14th day of January, 1896. (p. 25).

It was also alleged in the amended bill, that the shareholders of the American National were advised of its embarrassed condition, and that it was necessary to make the agreement of December 21, 1895; that they received and accepted the benefits of, and ratified and confirmed, the same, and thereby induced the Union National to pay the indebtedness of the American National by means of said agreement. (p. 24).

There was a prayer for a decree ascertaining the amount due to plaintiff on the note held by him, the names of the other creditors and the amounts due to each; that the decree ascertain and determine the names of all of the shareholders and the number of shares held by each; that it find and determine the amount due from, and for judgment against, each of them; and that

Burness make full report of the assets in his hands and abide the order of the court concerning the same (p. 29).

The appellant by his answer to the amended bill (Record, p. 34) admitted: the making of the agreement between the two banks of December 21, 1895; that the liabilities of the American National assumed by the Union National, exceeded the assets taken by the Union National as cash, by the sum of $201,000.00, and the making and delivery of the three promissory notes of $67,000.00 each, pursuant to and in performance of, said agreement of December 21, 1895.

Appellant denied that the assets of the American National which were not taken as cash by the Union National, were delivered to Thomas L. Kimball as trustee of the parties to the agreement of December 21, 1895, and averred that such assets were delivered to the possession of the Union National pursuant to that agreement; he denied that the shareholders of the American National, including himself, were advised of the embarrassed condition of the bank, and of the necessity of making the agreement of December 21, 1895; he denied that, with such knowledge, he had received and accepted the benefits of, and consented to, or ratified and confirmed, the same, and induced the Union National to pay the debts of the American National by said agreement; and he denied that the American National had gone into liquidation under the provisions of the Revised Statutes, Sec. 5220.

Appellant also plead affirmatively: the making of the agreement of December 21, 1895, as set forth above; the delivery of all the assets of the American National to the Union National, pursuant thereto; the ascertainment by the parties that the amount of the liabilities of

the American National, assumed by the Union National, was $240,929.51 in excess of the cash and assets taken as cash by the Union National; the making and delivery of the three notes for $67,000.00 each, and the Cashier's check for $39,929.51; that of the assets turned over to the Union National for liquidation, $371,765.00 (face value) remained in the possession of the Union National, and had not been liquidated or exhausted for the satisfaction of complainant's claim; and that the agreement of December 21, 1895, and the three promissory notes for the sum of $67,000.00 each, were *ultra vires* and void acts of the American National, and were not entered into or duly contracted in the ordinary course of its business and created no obligation for which appellant, as a shareholder, was individually liable under the acts of Congress.

The Union National answered as a defendant (August 2, 1901) setting up its claim as the owner of two of the notes for $67,000.00 each (p. 118).

After the case had been argued and submitted the circuit court made an interlocutory decree directing Burness to sell the remaining assets of the American National, which was done, the Union National being the purchaser (p. 123). This sale was confirmed and Burness was discharged (p. 124). A final decree was then entered by the circuit court, which adjudged the appellant to pay to complainant, Sumner Wallace, the sum of $1,744.50 (p. 137) and to the Union National the sum of $5,477.75 (p. 138) and costs, and execution was awarded (p. 139).

This decree was affirmed by the court of appeals.

Appellant prayed an appeal (p. 422), which was allowed (p. 426), and assigned errors (p. 423), and now relies upon each of the following errors alleged:

ASSIGNMENT OF ERRORS.

(1) The circuit court of appeals erred in its decree affirming the decree and judgment of the circuit court for the district of Nebraska; that is to say, in holding that the suit is one to wind up the affairs of a national bank and a suit arising under the laws of the United States of which the circuit court had jurisdiction.

(2) The circuit court of appeals erred in its interpretation of the contract of December 21, 1895, between the American National Bank and the Union National Bank and in holding the same to be merely a contract by which, "the Union National Bank assumed the payment of the liabilities of the American National to its depositors and on account of bills payable, and in return was to receive its cash, cash items and such bills receiveable as the former was willing to accept at par and without recourse. The difference between the aggregate of the amounts so received and the gross amount of liabilities assumed was to be represented by three non-negotiable promissory notes of the American National, the payment of which was to be secured by a pledge of all of its remaining assets to Thomas L. Kimball as trustee", which erroneous interpretation was material to the final conclusion of the court.

(3) The circuit court of appeals erred in holding that the contract of December 21, 1895, between the American National Bank and the Union National Bank, had been ratified by the shareholders of the American National Bank, and that the individual liability of shareholders under section 5151 of the Revised Statutes of the United States, might, therefore, be enforced.

(4) The circuit court of appeals erred in holding that the complainant—Sumner Wallace and Union National Bank could go behind the contract of December 21, 1895, and that their claims were, in equity, for the "contracts, debts and engagements" of the American National Bank, for which shareholders are made individually liable, under section 5151 of the Revised Statutes.

BRIEF.

1.

The Circuit Court had no jurisdiction for the following reasons:

(1) Although plaintiff is a citizen of the state of New Hampshire, and the defendants are citizens of other states, the suit is brought by plaintiff, as assignee, to recover the "contents" of a *chose in action*—to enforce the agreement between the two banks, each being a citizen of Nebraska.

(2) Section 2 of the Act of June 30, 1876, Comp. Stat. 3509, which conferred jurisdiction of a suit to enforce the individual liability of shareholders of a national bank which had gone into voluntary liquidation pursuant to the authority conferred by Section 5220, R. S. is *repealed* by Section 6 of the Act of August 13, 1888; and

The case is not brought within Section 2 of the Act of June 30, 1876, even if that section be still in force, because it is shown by the evidence that the proceedings of the American National, ostensibly taken pursuant to

section 5220, were a mere form, taken without any intention to exercise the powers conferred by that section, and long after the bank had, by the agreement of December 21, 1895, placed it beyond its power to liquidate its own affairs, and had undertaken to delegate that power to the Union National Bank.

(3) No law in force when the bill was filed confers jurisdiction of a suit against a national bank which is not brought by the United States, or by the direction of an officer or agent thereof, excepting Section 1 of the Judiciary Act of August 13, 1888.

Whether we consider the case as one against the American National, to which the relief sought against shareholders is ancillary, or *vice versa*, the jurisdiction must be found, if it exists at all, in that section and in the provision thereof conferring jurisdiction in suits "arising under" a law of the United States.

The American National Bank was a necessary party.

Richmond vs. Irons. 121 U. S. 27-48.
King vs. Pomeroy, 58 C. C. A. 209; 121 Fed. 287-295.
Swan Land Co. vs. Frank, 148 U. S. 603.

In order to invoke the jurisdiction granted of suits arising under a federal statute, it is necessary to show, by proper averments *in the bill*, that the matter to be litigated is a federal question.

Metcalf vs. Watertown, 128 U. S. 586.
Colorado &c. Co. vs. Turck, 150 U. S. 138.
Tennessee vs. Union &c. Bank, 152 U. S. 454.
Defiance Water Co. vs Defiance, 191 U. S. 184.
Arbuckle vs. Blackburn, 191 U. S. 413.

And the averments of the bill must show that the

issue tendered by it involves, really and substantially, a *dispute or controversy* as to the effect or construction of a law of the United States, upon the determination of which the right to relief depends.

It is not sufficient that the bill seeks to enforce a *right* created by federal statute. It must show a controversy or dispute "arising under", that is, involving and making it necessary for the court to determine the effect or construction of a federal statute.

Goldwashing &c. Co. vs. Keys, 96 U. S. 199.
Cook vs. Avery, 147 U. S. 375-384
Filhiol vs. Maurice, 185 U. S. 108-111.
Filhiol vs. Torney, 194 U. S. 356.
Defiance Water Co. vs. Defiance, 191 U. S. 184-190.
Arbuckle vs. Blackburn, 191 U. S. 405-413.

The amended bill is entirely deficient in these respects. It shows no federal question against either the American National or the appellant.

II.

The agreement of December 21, 1895, between the two banks, whereby the American National guaranteed the Union National against loss, and the so-called promissory notes for $67,000.00 each, were *ultra vires* the American National, because a national bank has no power to delegate, or to renounce, its own functions and power to voluntarily liquidate its own affairs. The power given by the statute to the national banks to go into voluntarily liquidation and be closed, must be exer-

cised by their own directors and officers and cannot be delegated.

But if the agreement of the American National be not held *ultra vires* in the absolute sense, it was, at least, not "duly contracted in the ordinary course of its business", by that bank.

In either case the individual liability of the shareholders, created by the statute, cannot be enforced for the satisfaction of the obligation. Such obligations are not contemplated by the statute which fixes the individual liability of shareholders.

Richmond vs. Irons, 121 U. S. 27.
Schrader vs. Manufacturer's Bank, 133 U. S. 67.
Ward vs. Joslyn, 186 U. S. 142.
California Bank vs. Kennedy, 167 U. S. 362-6.
Concord Bank vs. Hawkins, 174 U. S. 366.
McCormick vs. Market Bank, 165 U. S. 538.
Central Transportation Co. vs. Pullman Co. 139 U. S. 24.

III.

There is not, in this case, any principle of equity which entitles the plaintiff, or Union National, to be subrogated to the rights of the depositors and bills payable creditors, whose claims were assumed by the Union National; nor is the bill framed to tender such an issue. There is no averment of facts showing that a single one of such creditors could have enforced the individual liability of shareholders.

The Union National was a volunteer. It was not

required to pay, by any prior obligation or for the protection of some interest or right of its own. It assumed and paid the debts of the American National upon an original agreement, for a new consideration, and because it was believed to be a profitable venture. This creates no right to equitable subrogation.

Aetna Life Co. vs. Middleport, 124 U. S. 534.
Wood vs. Guaranty Co. 128 U. S. 416.
Railway Co. vs. Wortendyke, 27 N. J. Eq. 658.
Sanford vs. McLane, 3 Paige 122; 23 Am. Dec. 773-6.

IV.

The appellant is not bound by either estoppel or ratification.

Ratification by a shareholder of, or acquiescence by him in, the *ultra vires* contract of the corporation, does not enlarge the individual liability of the shareholder, created and limited by statute. He does not, by consenting that the corporation be bound, enlarge his own liability.

Ward vs. Joslyn, 186 U. S. 142.

But the agreement, being *ultra vires*, was not the subject of ratification.

McCormick vs. Market Bank, 165 U. S. 538.
Central Transportation Co. vs. Pullman Co. 139 U. S. 24-50.
California Bank vs. Kennedy, 167 U. S. 362.
Thomas vs. Railroad Co. 101 U. S. 71-82.
Oregon Ry. Co. vs Oregonian Ry. Co., 130 U. S. 1-22.
Ward vs. Joslyn, 186 U. S. 142-151.

ARGUMENT.

I.

This court has jurisdiction on appeal.

The jurisdiction of this court is found in Section 6 of the Act of March 3, 1891, creating the Circuit Courts of Appeals.

The case is not one which, on the merits, could, by the provisions of Section 5 of that act, have been brought to this court directly by appeal.

The plaintiff undertook by his bill to found the jurisdiction of the Circuit Court, not only upon diverse citizenship, but also upon Section 2 of the Act of June 30, 1876; also upon the ground that the case was one arising under a law of the United States, the jurisdiction being sustained by the Court of Appeals on the last ground. The case was not one arising under the patent laws, the revenue laws, the criminal laws, or in admiralty. The case, therefore, is one in which the decree of the Court of Appeals is not, by the provisions of Section 6 of the Act of 1891, made final, and in all such "cases", where the matter in controversy exceeds the sum of One Thousand Dollars, besides costs, Section 6 of that act creates a right of appeal to this court from the Court of Appeals, and an appeal brings the whole case to this court, notwithstanding the question of jurisdiction of the Circuit Court might, under Section 5 the Act of 1891, have been brought alone to this court directly from the Circuit Court.

It is fundamental that this court will always ex-

amine into its own jurisdiction and that of the court in which Federal jurisdiction was first invoked.

Defiance Water Company vs. Defiance 191 U. S. 184.

Continental National Bank vs. Buford, 191 U. S. 119.

American Sugar Refining Company vs. New Orleans, 181 U. S. 277-281.

Mansfield &c. Co. vs. Swan, 111 U. S. 379-382.

Northern Pacific Ry. Co. vs. Soderberg, 188 U.S. 526.

Metcalf vs. Watertown, 128 U. S. 586.

II.

The Circuit Court had no jurisdiction.

An opinion by the Circuit Court, announced before the filing of the amended bill, is in the record at page 10.

The opinion of the Court of Appeals is found at page 391.

(1) The jurisdiction of the Circuit Court on the ground of diverse citizenship was, clearly, not established. Plaintiff, Sumner Wallace, was a citizen of New Hampshire, and the defendants were all citizens of other states; but plaintiff sued as assignee of a non-negotiable chose in action, to recover the "contents" thereof. The paper was a non-negotiable contract between the Union National Bank (plaintiff's assignor) and the American National Bank, each of which was a citizen of Nebraska, and appellant and nearly all of the defendants were citizens of Nebraska.

The Court of Appeals *denied* this ground of jurisdiction. (Record, p. 393).

(2) But plaintiff also claimed that jurisdiction was devolved upon the Circuit Court by Section 2 of the Act of June 30, 1876. 19 Stat 63; Comp. Stat. 3509. That section is as follows:

> "Sec. 2. That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section five thousand one hundred and fifty-one of said statutes, may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

The Court of Appeals reached the conclusion, in its opinion, that this section is in force, and that, so far as this suit may be considered as one to enforce the liability of shareholders, the jurisdiction is sustained by this section; and, in the opinion, the following cases are cited to show *judicial recognition* that the section is still in force: *Commercial National Bank vs. Weinhard*, 192 U. S. 243-250; *Donald vs. Thompson*, 184 U. S. 71-75; *King vs. Pomeroy*, 121 Fed. 287; 58 C. C. A. 209; *Williamson vs. Bank*, 115 Fed. 793: 52 C. C. A. 1.

But an examination of these cases will show that no question was raised in either, and that it was not considered in either, whether this section was or was not in force, and I have not found any case in which the question has been raised or considered.

It was, of course, the purpose of this section to give the Circuit Court, as a court "having original

jurisdiction in equity", jurisdiction of this specific remedy for the enforcement of the individual liability of shareholders of national banks; but, I respectfully think, this provision was repealed by section 6 of the judiciary act of March 3, 1887, as corrected August 13, 1888; 25 Stat. 433; Comp. Stat. 514.

It was the purpose of this general judiciary act to *revise* prior laws, and to define *generally* jurisdiction of the Circuit Courts. One purpose, as declared in the title, was to "determine" the jurisdiction of such courts. The Act purports to define the whole jurisdiction of these courts, excepting as existing provisions conferring jurisdiction in *special cases* are expressly saved from the repealing clause.

Section 5 of this Act is as follows:

> "Sec. 5. That nothing in this act shall be held, deemed or construed, to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-one, or in six hundred and forty-two, or in six hundred and forty-three, or in seven hundred and twenty-two or in title twenty-four of the Revised Statutes of the United States, or mentioned in section eight of the act of Congress of which this act is an amendment, or in the act of Congress approved March first eighteen hundred and seventy-five, entitled 'An act to protect all citizens in their civil and legal rights.' "

It will be seen that, by this section, the act points out, specifically, the existing laws conferring jurisdiction upon the Circuit Courts in particular cases, which it is provided shall *not* be repealed or affected by any of its provisions. But Section 2 of the Act of June 30, 1876, is not mentioned in, and is, therefore, excluded from, this saving section.

Section 6 of the Act is as follows:

Sec. 6. That the last paragraph of section 5 of the act of Congress approved March third, eighteen hundred and seventy-five, entitled 'An act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from state courts, and for other purposes', and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be and the same are hereby repealed:

Provided, that this act shall not affect the jurisdiction over or the disposition of any suit removed from the Court of any state, or suit commenced in any court of the United States, before the passage hereof, except as otherwise expressly provided in this act."

It will now be seen that Section 2 of the Act of June 30, 1876, is not merely excluded from the saving provisions of section 5, but, by the repealing provisions of section 6, all inconsistent laws are expressly repealed; and it is too plain and elementary for controversy, that, having expressly enumerated the provisions conferring jurisdiction in special cases which are to be preserved and saved from repeal, all other such special provisions are repealed—if they are in conflict with the provisions of the Act of August 13, 1888.

Is Section 2 of the Act of June 30, 1876, in conflict with the provisions of the Act of August 13, 1888?

That Section conferred jurisdiction, notwithstanding the suit is not (1) one "arising under" the constitution or laws of the United States or treaties made under their authority; or (2) one in which there is a controversy between citizens of different states; or (3) one in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars; or (4) one in which there is a controversy between citizens of the same state claiming lands under

grants from different states; or (5) one in which there is a controversy between citizens of a state and foreign states, citizens or subjects. But by Section 1 of the Act of 1888, one (or more) of these facts is essential to the jurisdiction in *every* civil case—excepting those special cases in which the jurisdiction is expressly preserved by the reservations contained in section 4 (to be noticed further on) and section 5 quoted above.

The conflict, therefore, is clear and certain, and, reading sections 5 and 6 together, there seems to be no escape from the conclusion that the intention of Congress was to repeal *all* jurisdiction not expressly saved by that act, and that section 2 of the act of June 30, 1876, not being so saved, is repealed by section 6, of the act of August 13, 1888.

(3) There is also abundant reason for the contention that Section 2 of the Act of June 30, 1876, is not applicable to the case at bar, even if it be still in force.

That section is, by its terms, limited to cases in which a "national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty", of the Revised Statutes. This prerequsite is a fact which must, if in issue, be established by evidence. This issue was raised by the answer, and the evidence shows that the American National had not, in fact, gone into liquidation under the provisions of section 5220. The evidence shows, it is true, that the association, two months after the assets had been turned over to the Union National, went through the *form* of exercising the power conferred by section 5220, and taking the steps required by section 5221; *but it was a mere form.* Mr. Wyman, who had been the cashier of the American National, and who

was employed by Kimball to assist in liquidating the assets after the transfer of them to the Union National under the agreement of December 21, 1895, testified (commencing at page 175 of the record), as follows:

"Q. Then those notes were given to the Union National for the purpose of off-setting liabilities of the American National Bank which the Union National Bank had assumed?

A. Yes sir.

Q. And neither you nor any of the officers of the American National Bank or the Union National Bank, at the time, expected that the American National Bank would have to pay anything to the Union National Bank under the contract of December 21, 1895, did they?

A. We expected the assets to pay that indebtedness.

Q. And the assets turned over to the Union National Bank largely exceeded the amount of these three notes at their face value?

A. Yes sir.

Q. You were employed by Mr. Kimball, were you not, acting in his capacity as trustee as he is designated in that contract of December 21, 1894?

A. Yes sir.

Q. And he paid you for your services?

A. Yes sir.

Q. So that you were representing him in the collection of the assets of the American National Bank which were turned over to the Union National Bank?

A. Yes sir.

Q. At the time of the passage of the resolution of the stockholders, directing the directors of the American National Bank to take steps looking to the liquidation of the American National Bank, and the subsequent proceedings of the American National Bank, ostensibly for its voluntary liquidation, the American National Bank had no assets had it?

A. No sir.

Q. And its liabilities had been assumed by the Union National Bank?

A. Yes sir.

Q. Well, what was then done by the American National Bank, its directors or officers, in the way of liquidating the business of the Bank?

A. We went through the form prescribed by the National banking law.

Q. Passed the necessary resolutions?

A. Yes sir.

Q. And gave the notices?

A. Yes sir.

Q. But in fact there was nothing to liquidate, was there?

A. No sir.

Q. It was a mere form?

A. We went through the form, that was all, yes sir.

The association had bonds deposited to the amount of $50,000.00 to secure circulation amounting to $45,000.00 (p. 182). The bonds, including the premium, were worth about $9,000.00 more than the amount necessary to redeem the circulation, but the comptroller could not recognize the agreement of December 21,1895, and there was no provision of law under which the circulation could be redeemed and the bonds withdrawn and sold, excepting the provision of Sec. 5222 R. S., applicable to cases of voluntary liquidation under Sec. 5220. It was, therefore, thought that such liquidation was "required by law", and a resolution was passed (p. 261) instructing the directors to "take action looking to the liquidation required by law", and pursuant thereto a resolution was passed February 25, 1896, that the bank "be placed in voluntary liquidation under the provisions of Sections 5220 and 5221 U. S. Revised Statutes." (p. 264). The sole purpose of this action seems to have been to procure the surrender and sale of the bonds deposited to secure circulation, in order that the $9,000.00 in excess of what was necessary to redeem the

circulation, might be turned over to the Union National, pursuant to the agreement of December 21, 1895, and nothing more than was necessary to accomplish this purpose was done.

When Congress passed Section 5220 and 5221, it was the intention to confer the power and provide the method by which these associations might liquidate their own affairs through their own officers and directors, the association retaining control not only of its property and assets, but of its officers and directors. Congress conferred this power upon a National Bank Association in order that it might be, in good faith and actually, exercised by its own officers in administering what, under such conditions, becomes a trust fund for the benefit of creditors and shareholders, of which the directors and officers are trustees. This power was not conferred upon an association which had renounced or abdicated all of its functions and which no longer contemplated the exercise of its powers, not even the power to voluntarily liquidate, and which had transferred the whole of its assets so that it was powerless to itself carry on liquidation; nor was it contemplated that an association which had so divested itself of all but a legal existence should, by mere pretense of exercising this power, affect important rights, or that it should thereby determine the jurisdiction of courts.

The evidence shows that it was long after the making of the agreement of December 21, 1895, and the delivery of all its assests by the American National to the Union National, pursuant thereto, that the first step in this pretended liquidation was taken, at a special meeting of the directors; that the association did not contemplate any liquidation by the exercise of its own powers and through its own officers, but it had surrendered the

whole of its assests, then constituting a trust fund for the benefit of the creditors and shareholders, to the Union National, to whom, with Kimball, as agent for *both* parties, it had confided the administration of the trust without any limitation whatever upon the powers of either. The American National was so far from, in fact, intending liquidation and the exercise of its own powers, under sections 5220 and 5221, that it had, by the agreement and the transfer of its assests, precluded, so far as was within its power, the possibility of doing so. The association had completely lost the control of its assests and all power to liquidate them through its own board of directors and officers, because, although Kimball, its President, was designated in the agreement of December 21, 1895, as trustee of the proceeds of the assests, for both parties to the agreement, and it was provided that the liquidation should be conducted under his direction on behalf of the stockholders of the American National, it was also agreed that the Union National should liquidate the assests, and that for that purpose, as well as to secure the Union National against loss by its assumption of liabilities, the assests should be, and they were in fact, transferred to the Union National. The substance of the agreement was, that the assets of the American National were sold and assigned, (the words are: "Agrees to sell and assign and does hereby sell and assign"), as security to, and to be liquidated by, the Union National, but that the liquidation should be carried on under the direction of Kimball.

Having *agreed* with the Union National that it should conduct the liquidation under the direction of Kimball, the American National had no more control over its assets or the liquidation of them than it would have had if Kimball had not been named. It could not, by any ac-

tion of its directors or shareholders, remove or direct Kimball without the consent of the Union National. It gave to the Union National and Kimball an absolute and unlimited discretion. All power to itself liquidate the assets, or control the liquidation, was completely renounced and completely vested in the Union National and Kimball. If the American National had appointed Kimball its own agent to liquidate its assets in its own behalf, it would have retained and might have exercised the usual power and control which a principal may exercise over his agent. But when, by agreement with the Union National, which had acquired an important interest in the assets, Kimball was designated, without reservation or limitation of his power, to direct the liquidation, the Union National had the same right to insist upon that part of the agreement that it had to insist upon any other part. The mere fact that Kimball was the President of the American National is not important. This agreement did not provide for the exercise of his powers as President of the association, but renounced in his favor, (in conjunction with the Union National) all of the powers of the American National to control and liquidate the assets through its own officers, directors and shareholders, exercising their proper functions.

Can a mere vote of shareholders to go into liquidation under the provisions of section 5220, not meant to be carried out and impossible to be carried out in fact, create a case under section 2 of the Act of June 30, 1876? I do not find any case in which this questien has been considered and I submit that the language of the section cannot be enlarged to cover the case at bar as it stands upon the undisputed facts.

In order to bring the case within the obvious purpose, of section 2 of the Act of June 30, 1876, the asso-

ciation must, I submit, have gone into liquidation, in fact, and actually, intending to avail itself of the power given to voluntarily liquidate its own affairs, pursuant to section 5220, by its own proper officers, under the direction and control of its Board of directors.

(4) The court of Appeals did not, however, place full reliance, in its opinion, upon section 2 of the Act of June 30, 1876, for the jurisdiction, by the Circuit Court, of this suit. It found the jurisdiction more satisfactorily provided for by the judiciary act of August 13, 1888, and held that the suit was, (1) a case for "winding up the affairs" of a national bank within the provisions of section 4, and also, (2) a suit arising under the laws of the United States within section 1, of that act.

The suit seeks to enforce two remedies. The assets of the American National had been pledged by the agreement of December 21, 1895, as security for the promissory note held by plaintiff, and two other like notes held by the Union National. The assets were, so far as they had not been converted (at the time of the commencement of the suit) in the possession of the Union National, and, with Kimball, that bank was invested with power, and obligated by the agreement, to liquidate the whole, apply the proceeds to the payment of these notes, and account for any surplus. The plaintiff claimed a lien on the assets. He sought in this suit the enenforcement of his lien by sale of the assets, and a judgment against the American National Bank for such sum as should remain unsatisfied from the proceeds of the sale—that is, a judicial ascertainment of the debts and liabilities of the American National; a judicial determination of the necessity for enforcing, and the extent to which it was necessary to enforce, the individual liability of shareholders in order to satisfy the indebtedness of the asso-

ciation as it should be ascertained after a sale of the assets of the bank; and, several judgments against the shareholders. For this purpose he made the American National and Kimball parties defendant, as well as all of the shareholders, and the decree of the Circuit Court determined these questions and granted the relief.

As the liability of the shareholders is, by the terms of Section 5152, R. S., declared to be "equally and ratably, and not one for another," the judical determination of the amount of the liabilities, and the necessity for enforcing, and the extent to which it was necessary to enforce, the individual liability of shareholders, was a prerequisite to any judgment fixing liability upon them. It was necessary to determine: (1.) that there was an unsatisfied indebtedness due from the bank to complainant and others before it was possible to say there was *any* liability, and this involved the sale and application of the proceeds of the assets; and (2) the amount of such indebtedness, the identity of each creditor and the amount of his claim, and the number of shares held by each shareholder, before it was possible to determine what rate of liability would fall upon each.

In *Richmond vs. Irons*, 121 U. S. 27–48, it was said:

> "As all the shareholders were bound in that way (equally and ratably) to the creditors, any proceeding to enforce this liability must be such as, from its nature, would enable the court to ascertain for what the shareholders ought to be made liable, to whom, and in what proportion as respects each share."

In *King vs. Pomeroy*, 58 C. C. A. 209; 121 Fed. 287-295, the court, approving *Williamson vs. American Bank*, 52 C. C. A. 1; 115 Fed. 793, so far as that case held the insolvent bank was a necessary party to such determination, said:

"The ascertainment of the debts and liabilities of the bank, and the judicial determination of the necessity and the requisite extent of the enforcement of the stockholders liability, are essential pre-requisites to the collection of the amounts owing by them, and the insolvent bank is a necessary party to these adjudications."

The American National was an indispensable party.

Swan Land & Cattle Company vs. Frank, 148 U. S, 603.

If, therefore, this suit be one against the American National Bank to wind up its affairs (which seems to have been the view taken by the Court of Appeals) in which the relief sought against the individual shareholders is ancillary, still, if the Circuit Court had no jurisdiction to determine these primary and pre-requisite questions, it would have no jurisdiction to determine any.

It is now necessary to inquire whether the suit was one of which the Circuit Court had jurisdiction by virtue of anything contained in Section 4 of the Act of August 13, 1888. That section is as follows:

"Sec. 4: That all national banking associations established under the laws of the United States shall, for the purpose of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the state in which they are, respectively, located; in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States, or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

The first provision of this section, it will be observed, does not *confer* any jurisdiction whatever in suits

against national banks. It declares their citizenship and *denies* jurisdiction to the Circuit Courts, "other than such as they would have in cases between *individual* citizens of the same state."

Nor does the second provision *confer* any jurisdiction. It merely restricts the operation of the first provision; that is, it shall not "affect the jurisdiction" of the courts of the United States in cases commenced by the United States, or by direction of any officer thereof, or cases for winding up the affairs of any such bank. In these excepted cases, whatever jurisdiction is elsewhere given is merely *saved* by this section, and we must look elsewhere to find what jurisdiction is thus preserved. It is erroneously assumed in the opinion of the Court of Appeals that this section *confers* jurisdiction in cases for winding up.

Prior to 1882 the Circuit Court had jurisdiction of *all* suits brought by or against any national bank. This jurisdiction was based solely upon the *Federal origin* of these associations; but it gave rise to much complaint, and by the Act of July 12, 1882, 22 Stat. 162; Comp. Stat. 3458, the following was enacted:

> "Sec. 4. * * * * *
> *Provided, however*, that the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any laws of the United States which do, or might do, banking business where such national banking associations may be doing business when such suits may be begun. And all laws and parts of laws of the United States, inconsistent with this proviso be, and the same are, hereby repealed."

Congress was not willing to withdraw from the

Circuit Courts all jurisdiction based upon the Federal origin of the banks, but by this provision it cut that jurisdiction down until nothing remained but suits *between* them and the United states, or its officers and agents. In no other cases whatever was there any jurisdiction in the Circuit Courts, because of the Federal origin of the banks, at the time of the enactment of the Judiciary Act of August 13, 1888, and it it is clear that it was then not the intention of Congress to entirely repeal the jurisdiction founded upon Federal origin, but to further *restrict* it, and by section 4 of that act, the jurisdiction was still further restricted to cases *commenced* by the United States, or by direction of any officer thereof, or cases for winding up the affairs of any such bank. But, as already pointed out, Congress was not, in this section, conferring any jurisdiction, nor had it ever conferred jurisdiction, in terms, in cases for "winding up" the affairs of a national bank. It was merely *saving* jurisdiction based upon the Federal origin of the banks, and in order to find what jurisdiction was thus saved, we must consider the proviso of section 4 of the Act of 1882, quoted above. Reading that provision with the restriction contained in section 4 of the Judiciary Act of August 13, 1888, no suit against a national bank is within the jurisdiction of a Circuit Court *if not commenced by the United States, or by an officer or agent of the United States*—unless the controversy be one of which the court would have jurisdiction if it were between individuals of the same citizenship. It is obvious, therefore, that the mere fact that this suit is one for winding up the affairs of a national bank (assuming it to be such) does not help the jurisdiction at all, because it was not commenced by an officer or agent of the United States.

It is clear that it was the purpose of Section 4 of

the Act of August 13, 1888, to save whatever jurisdiction then existed in cases "for winding up the affairs" of national banks. But to what provision conferring jurisdiction does it refer, if it be not the provision for jurisdiction of suits commenced by officers or *agents* of the United States?

It will be observed that, by the *proviso* to Section 4 of the act of 1882 (quoted above), the jurisdiction for suits by and against the national banks resting upon their Federal origin was cut down to suits *between* them and the United States or its officers and agents. Under the statutes theretofore enacted, the decisions of this court and the reservation contained in the proviso, *any* suit brought by an agent of the United States though he was not an officer of the United States, against a national bank, or by a national bank against such an agent, was within the jurisdiction of the Circuit Courts.

Now, by Sec. 4 of the act of 1888 (quoted above), this jurisdiction was again delimited, saving the jurisdiction only for suits *commenced* by the United States, or by direction of any officer thereof, or cases for winding up the affairs of any such bank, the word "agent" being now omitted and the words "or cases for winding up the affairs of any such bank" being substituted. A suit commenced by an agent of the United States against a national bank was not left within the jurisdiction of the Circuit Court; but suits for winding up were—*so far as pre-existing laws conferred such jurisdiction.* But pre-existing laws conferred such jurisdiction only when the suit was between "an officer or agent" of the United States and a national bank. It follows logically that the provision of Sec. 4 of the act of 1888 saving the jurisdiction for cases in winding up, merely extends to cases commenced by an agent of the United States. Suits

against a national bank commenced by the United States, or by direction of any officer thereof, and cases commenced by an agent of the United States for winding up the affairs of any such bank, are within the jurisdiction of the Circuit Court. No other suits are, unless they fall within some of the provisions of Sec. 1 of the act of August 13, 1888.

In *Petri vs. Commercial Bank*, 142 U. S. 644-649, it is said:

> "So far as the mere source of its incorporation rendered the suits to which a national bank might be a party, cognizable by the Circuit Courts, that was taken away, but the jurisdiction which those courts might exercise in such suits, when arising between citizens of different states, or under the constitution or laws of the United States, except in that respect, remains unchanged."

It is not denied that the jurisdiction in cases arising under the laws of the United States embraces suits against national banks, *when the bill sets forth a case of that character.* But a case, even if it be "for winding up the affairs" of a national bank, is not, for that reason alone, one arising under the laws of the United States.

It was formerly held by this court that a suit against a national bank, as in the case of other Federal corporations, was necessarily a suit arising under the laws of the United States, because "they were created by Congress and could acquire no right, make no contract and bring no suit, which was not authorized by a law of the United States."

Petri vs. Bank, 142 U. S; 644-648.

But the fact that these associations exist by virtue of, and derive all of their powers from, the laws of the United States, is now, by the acts of Congress, eliminated from consideration in determining the question of

jurisdiction, and the question must be solved by applying the same test, excepting in cases commenced by the United States, or by the direction of an officer thereof, or by an agent of the United States, for winding up, as determine the question in suits between in dividuals of the same citizenship.

The argument is now reduced to a single question—Is the case a suit arising under the laws of the United States, in the sense of Section 1 of the Judiciary Act of August 13, 1888?

It is not of that character merely because plaintiff seeks (in addition to the obligation of the bank under the agreement of December 21, 1895), to enforce the individual liability of shareholders—created by a law of the United States.

This question must be determined upon the averments of the bill, and in order to invoke the jurisdiction it must appear from those averments that the case presented is one "arising under" the laws of the United States. It is the plaintiff's statement of his own case which must satisfy the test. The Federal question must there appear and be shown to be involved. No issue tendered by a defendant which raises a question under the laws of the United states will cure a want of jurisdiction at the time of filing a bill.

Metcalf vs. Watertown, 128 U. S. 586.

Colorado Central Mining Co. vs. Turck, 150 U. S. 138.

Tennessee vs. Union & Planters Bank, 152 U. S. 454.

Defiance Water Company vs. Defiance, 191 U. S. 184.

Arbuckle vs. Blackburn, 191 U. S. 413.

And the averments of the bill must show that the case presented, really and substantially, involves a *dispute or controversy* as to the *effect or construction* of a law of the United States, *upon the determination of which the result depends.*

In *Gold Washing &c. Co. vs. Keyes*, 96 U. S. 199, the suit was instituted in the state court to enjoin the Gold Washing Company from depositing the tailings and debris from its mines in the channel of a river by which they were carried upon the land of Keyes. The company removed the case to the Circuit Court and in the petition alleged that it claimed the right to deposit the tailings and debris as it was doing under certain acts of Congress, specifying them in the petition, and then alleged that the "said action arises under, and its determination will necessarily involve and require the construction of, the laws of the United States", *etc.* It was said in the opinion (page 203):

> "A cause can not be removed from the state court simply because, in the progress of the litigation, it may become necessary to give a construction to the constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the constitution or laws upon the facts involved."

In *Cook vs. Avery*, 147 U. S. 375-384, it is said:

> "Whether a suit is one that arises under the constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the constitution of the United States, or a law of the United States, or sustained by the opposite construction, then the

case is one arising under the constitution or laws of the United States."

In *Filhiol vs. Maurice*, 185 U. S. 108-111, the plaintiff alleged in his bill that by the fifth amendment of the Constitution of the United States, and the third article of a Treaty of the United States of America and the Republic of France, the United States undertook and agreed to maintain the said Don Juan Filhiol and his heirs in their right and title to the land in controversy, and their full enjoyment of the same; but, in violation of the provisions of said treaty and without due process of law, and in violation of the fifth amendment of the constitution of the United States, defendants did, without condemnation and without compensation to plaintiffs, on or about the 2nd day of January, 1897, wrongfully and without right, oust the plaintiffs from the possession of the land, and on these facts, in a suit of ejectment, plaintiff claimed that the case was one arising under the constitution or a treaty of the United States. It is said in the opinion:

> "Did it appear from plaintiff's own statement that the case arose under the constitution, or a treaty of the United States? We do not think it did.
>
> * * * * * * *
>
> But no right, title, privilege or immunity was here asserted as derived from the constitution or the treaty, as against these private individuals, who were impleaded as defendants, either specifically or through averments that plaintiffs were ousted in violation of the treaty and of the fifth amendment, the provisions of which it was the duty of the federal government to observe. * * *
>
> It was not charged that they took possession by direction of the government, and plaintiffs set up no more than a wrongful ouster by merely private persons remediable in the ordinary course and in the proper tribunal."

See also *Filhiol vs. Torney*, 194 U. S. 356.

In *Defiance Water Company vs. Defiance*, 191 U. S. 184–190, quoting from *Telegraph Company vs. Railroad Company*, 178 U. S. 239–243 it is said (the italics are mine):

> "We have repeatedly held that, 'when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the constitution or laws. *And it must appear on the record by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States, before the jurisdiction can be maintained on this ground.*' "

It was also said in that opinion, commencing at the bottom of page 193:

> "Moreover, the state courts are perfectly competent to decide Federal questions arising before them, and it is their duty to do so. * * * And, we repeat, the presumption is that in all cases the state courts will do what the constitution and laws of the United States requires * * *.
>
> If error supervenes, the remedy is found in Section 709 of the Revised Statutes."

In *Arbuckle vs. Blackburn*, 191 U. S. 405-413 the suit was brought to restrain the Dairy and Food Commissioner of the state of Ohio from enforcing an act of the Legislature of that state, and it was alleged in the bill that the act "construed as respondent claims it should be, is in conflict with the Fourteenth Amendment to the Constitution of the United States and void, in that it would deprive complainants of the aforesaid property,"

and would deny them "equal protection of the law;" and also, "and said statute, if construed as respondent herein claims it should be, is a regulation * * * of interstate commerce," *etc.* It is said in the opinion (the italics are mine):

> "The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the constitution, upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form, such as is reqired in good pleading.
>
> The averments of this bill did not bring the case within that rule, for they put forward no existing controversy as to the effect or construction of the constitution, on which the relief depended, and set up no right whieh might be defeated or sustained according to such construction."

It was further said in the opinion, (top of page 415,) that the suggested controversy was "purely hypothetical and based the supposed constitutional objection on the contingency that, on issues of fact, it might be judicially determined that Ariosa came within the statute, which complainant denied." And also that, "Reference to the constitution to strengthen objections to a particular construction, or the pursuit of a certain course of conduct, is not sufficient to invoke jurisdiction."

In the case at bar, the suit, in its substance, is a suit against the American National Bank to enforce the agreement of December 21, 1895, by a sale of the assets pledged as security, and in which the enforcement of the statutory liability of shareholders for the satisfaction of the same obligation is ancillary and depending upon the result of the sale.

Elminating from consideration the Federal origin of

the bank, and treating the question as if the suit was between "individual citizens of the same states" as the parties to this bill, there is not in the bill, so far as the averments against the bank are concerned, the least suggestion of a Federal question. The bill states nothing whatever more than an ordinary contract right or demand against the bank.

So far as the averments to charge the shareholders are concerned the bill contains the following (printed record, page 28):

"That by the reason of the voluntary liquidation of the said bank as hereinbefore set forth and the insolvency of said bank, and its inability to meet its obligations, this action is brought against the American National Bank and its stockholders jointly, under and through the authority granted by the laws of the United States relating to banking.

And your orator shows to this court that under and by virtue of the banking laws of the United States, each and every of said shareholders, holders of stock of such American National Bank, is held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of the said American National Bank, to the extent of the amount of his, her or its stock therein, at the par value thereof, in addition to the amount invested in said shares, and that each and every of the stockholders of the American National Bank, and each and every of the defendants named herein, are liable for the payment of the claim of your orator, and of the claims of all other creditors of the said American National Bank, to the amount of stock so held by said defendant."

It seems clear that the plaintiff was relying upon section 2 of the Act of June 30, 1876, already shown to have been repealed by the Act of August 13, 1888. Beyond this, these averments constitute nothing more than the assertion of a *right*, created by Federal law, to charge the shareholders individually, equally and ratably, for the contract obligation of the bank. But a bill

which merely shows that the right which it seeks to enforce is created by a statute of the United States does not invoke the jurisdiction, because it fails to show any dispute or controversy, "arising under" the statute.

The cases have firmly established the rule that the bill must allege distinctly, and in legal and logical form, such as is required in good pleading, *facts* which show that the case involves a real and substantial dispute or controversy as to a right, the solution of which dispute or controversy depends upon the construction or effect of the Federal law; so that, if the disputed construction or effect of the law be solved in one way, the right asserted by the bill will be upheld and enforced, but defeated if solved in accordance with the opposite construction. Nothing of this character is put forth in the bill in this case.

The state courts are fully competent to enforce rights created by Federal laws, and when a bill in the Circuit Court shows nothing more than such a right, which it seeks to enforce, the Federal jurisdiction is appealed to upon the assumption, or mere hypothesis, that the state court will not enforce the law. But the jurisdiction is not predicated upon this or any other hypothesis, but upon the certainty of a real and substantial dispute or controversy "arising under" the law, which must be set forth in the bill.

The Court of Appeals, in its opinion, cited its own case, *Guaranty Company vs. Hanway*, 44 C. C. A., 312, 104 Fed. 369, to sustain the jurisdiction on the ground that this suit is one arising under a law of the United States. But the analogy is not apparent. In that case, Hanway was the "shareholder's agent" provided for by Section 3 of the Act of June 30, 1876. A receiver had been appointed for a national bank by the Comptroller of

the Currency. The receiver had paid all claims, the expenses of the receivership, and money had been deposited to secure the redemption of the circulation. Pursuant to the provisions of that section, Hanway was then chosen by the shareholders as agent, and the remaining assets were transferred to him by the receiver and Comptroller. *All* of the powers and duties of such agent are created and defined by that section of the Act of Congress and the opinion of the Court of Appeals proceeded upon the theory that, like a receiver of a national bank, Hanway was an officer and agent of the United States, because the Act of Congress created his office, granted his rights and powers, and imposed his duties, and because every action by or against him involved the exercise of some of his rights or the proper discharge of some of his duties, and the consideration of the proper construction of the Act of Congress from which they were derived. Of course, the statute which, in a suit against a national bank, eliminates consideration of those laws, which create and define its powers and duties (its Federal origin) would not, in a suit against such an agent, be applicable. In that case it is said in the opinion:

> "The same reasons bring actions by or against a shareholder's agent under the same rule (as in suits by or against receivers of National banks). He is chosen under the same Act of Congress. He is selected for the same purpose. At a certain point in the administration of the trust, the act of Congress empowers the shareholders of a national bank to determine by ballot 'whether the receiver shall be continued, or whether an agent shall be elected for that purpose'. If they vote to continue the receiver, subsequent actions by or against him arise under the laws of the United States. If they vote to choose an agent for the same purpose under the same law, it is difficult to perceive why actions by

or against him do not arise under the laws of the United States. Those laws empower the agent, when chosen, to hold, control, and dispose of the property of the banking association which he receives for the benefit of the shareholders, to sue and to be sued, and to do all lawful acts necessary to finally settle and distribute the assets in his hands. They authorize him, with the consent and approval of the circuit or district court of the United States for the proper District, to sell, compromise, or compound the debts due to the association, and require him to report to, and obtain a final settlement of his accounts in, one of those courts. They specifically prescribe the purposes to which the proceeds of all the property which comes to his hands as the agent of the shareholders shall be devoted, and the order in which they shall be applied to those purposes."

There is, however, nothing of this kind in the case at bar. It is true, that Kimball was named in the agreement of December 21, 1895, as the agent of both parties to that agreement, and that, two months afterwards, February 25, 1896, at a special meeting of shareholders, a resolution then adopted to place the bank in liquidation (record, page 264), also provides, "that Thomas L. Kimball be and hereby is appointed the agent and trustee of the shareholders of said bank to effect such liquidation." But whatever his real relationship may have been, Kimball was not an agent by virtue of any Federal law, and he had no power and was under no duty created or imposed by any such law, and cannot be said to have been, in any sense, an officer or agent of the United States.

Weeks vs. Trust Company, 125 Fed. 379, 60 C.C.A. 236, also cited in the opinion of the Court of Appeals, merely followed *Guaranty Company vs. Hanway*, on the same facts.

III.

(*1*) *The agreement of December 21, 1895, between the two banks, was ultra vires the American National Bank.*

(*2*) *But if it be held not ultra vires in the absolute sense, the obligation thereby undertaken by the American National was not "duly contracted in the ordinary course of its business."*

(*3*) *In either event shareholders are not individually liable.*

The Circuit Court adopted the view that the transaction between the two banks was a lending of money by the Union National, and, consequently, a borrowing of money by the American National, and, therefore, within its powers and in the ordinary course of its business. (Record, p. 126).

The Court of Appeals interpreted the transaction (so far as it was deemed necessary to consider it in disposing of the case) as a contract by which: "The Union National assumed the payment of the liabilities of the American National to its depositors and on account of its bills payable, and in return was to receive its cash, cash items and such bills receivable as the former was willing to accept at par, and without recourse. The difference between the aggregate of the amounts so received and the gross amount of liabilities assumed, was to be represented by three non-negotiable promissory notes of the American National, the payment of which was to be secured by a pledge of all of its remaining assets to Thomas L. Kimball as trustee." (Record, p. 392).

The Court of Appeals then waived the considera-

tion of the question of power to enter into the agreement and held that the shareholders had *ratified* it and had thereby become individually liable. (Record, p. 398).

Each of these propositions, in the opinion of the Court of Appeals, is assigned as error.

It must be borne in mind that the appellant is not contending that the American National, the corporation, is not bound by the agreement of December 21, 1895, on principles of estoppel or ratification; but his contention is that the obligation which the corporation, through its officers, has undertaken to create by that agreement is not one for which the statute makes shareholders individually liable. It may be conceded that the corporation, although the agreement was absolutely *ultra vires*, at the time of its execution, has become liable, at least in some manner, by reason of subsequent events. It will not follow that shareholders are individually liable.

It is the appellant's contention that the inducement or consideration to the Union National was the acquisition of the business of the American National, and that the transaction was:

(1) *An absolute sale and transfer* of the business, the cash and cash items, the furniture and fixtures, and so much of the remaining assets of the American National as the Union National should take as cash. It hardly seems possible to have expressed this purpose more formally than it is expressed in the writing. By the terms of the writing, the American National agrees to "sell and assign and does hereby sell and assign", and the Union National "agrees to purchase and does purchase", *etc.*

(2) *A conditional sale and transfer* of all of the remainder of the assets of the American National to the

Union National as security, and to enable the Union National to liquidate and convert them into money under its agreement to do so. Here, also, the writing is as formal and certain as it could well have been made. The words are: "And as further security", the American National "agrees to sell and assign, and does hereby sell and assign" to the Union National. This shows a clear purpose to vest the title in the Union National to enable it to liquidate the assets under its agreement, and to reimburse itself for the sum it should pay by assuming the debts of the American National due to depositors and for bills payable.

(3) *A guaranty by the American National against loss* to the Union National, that is, that the Union National would realize by such liquidation, a sum equal, at least, to the obligations which it had assumed. Again, the writing is formal and explicit. By its terms, the American National "further agrees to guarantee and does hereby guarantee" the Union National against all loss in consequence of having assumed such obligation.

(4) *That there was no debt to the Union National* and that the three so-called promissory notes for $67,000 each, were not evidence of any debt, but merely the *form* in which the American National expressed, in part, its guaranty against loss, for the convenience of the Union National. The writing makes it clear beyond controversy that these notes were not designed to evidence any *debt*. The amount guaranteed by the American National could not be ascertained and fixed in the principal writing, at the time of its execution, and immediately following the guaranty, the writing provides: "And to this end", that is, to the end that the Union National should be guaranteed against loss, the Ameri-

can National agreed to give the three non-negotiable notes, *etc.*

(5) That the consideration to the American National was, not money borrowed or received by it, but the promise of the Union National to pay its debts, liquidate the whole of its assets without charge therefor, and to account for any surplus.

The conclusion of the Circuit Court (which I presume will be pressed in argument here) that the transaction was a borrowing of money by the American National, and the construction put upon the agreement by the Court of Appeals, ignore the essential features of the transaction. It was one transaction, and the agreement and notes must be considered together in order to determine the real character of it; and when so considered, it seems impossible to regard the notes as anything more than a part of the contract of guaranty. It is true, the notes do not, when thus considered with the agreement, express any higher obligation than the agreement of guaranty, standing alone, would express; but the agreement defines and limits the legal obligation of the notes, which were made non-negotiable in order that they might not, by transfer, be made to import a higher obligation than that expressed in the agreement. It was convenient, if not necessary, to have it in the form the parties put it. The Union National was acquiring the business of the American National. It was not paying, but was assuming the payment of depositors balances. Its motive was to retain these depositors in its own business to the extent that the actual payment and closing of accounts should not be demanded by them. Its method would be, and was in fact, to transfer the accounts from the books of the American National to its own books. These accounts, when transferred, would

become "liabilities" on its books, for which it must have assets in equal amount. The notes secured by the assets of the American National would answer this purpose, pending the liquidation of the assets.

MR. BAIRD, commencing at the bottom of page 151 of the record, testifies as follows:

"Q. But the Union National Bank had not, at that time, paid the deposits, it had only agreed to pay them?

A. No sir; it had only agreed to pay them at the time those notes were executed.

Q. So there was no indebtedness from the American National Bank to the Union National Bank?

A. None, only what was implied in, or resulted from, that contract, so far as I know.

Q. And is it not true, that, at that time, the Union National Bank expected to liquidate the assets of the American National Bank rapidly enough to meet the demands of the depositors of the American National Bank?

A. It is true, that all parties connected with the contract expected, at that time, to be able to realize on the assets of the American National Bank within the time necessary to meet these notes.

* * * * *

Q. And these notes were not given because of the existence of an obligation or debt at that time for the amount of them, or because you expected an obligation or debt of that amount?

A. They were not given at the time for any debt which had previously existed from the American National Bank to the Union Bank; but they were given as a means of meeting the obligation which confronted the American National Bank, which it was not able to meet, at this time, without making some terms.

Q. Well, the Union National Bank transferred the depositors accounts of the American National Bank to its own books, did it not?

A. I do not know what the process was there.

Q. You were a depositor of the American National Bank?

A. Yes sir.

Q. And you say you drew your check and got your money?

A. I did; I transferred my account to the Union National, as I now remember it.

Q. That is the way in which the American (Union) National paid you?

A. Yes, the Union National paid me by giving me credit on my account with the Union National.

Q. Then you drew your check on the American National?

A. Yes, for whatever balance I had there at that time.

Q. For the mere purpose of transferring your account to the Union National?

A. Yes sir.

Q. And the Union National Bank procured the other depositors to do the same, in so far as they did not demand the money, did it not?

A. So far as I know.

Q. And that would necessitate the Union National Bank having some assets to offset the amount of the deposit of the American National Bank that it assumed in your case, would it not?

A. I presume it would, as a matter of banking business, in order to meet the demand of the Comptroller of the Currency.

Q. So far as the American National Bank's cash on hand was concerned, and its bills receivable which the Union National accepted as cash, the Union National carried that right into its own assets?

A. That was my understanding, yes sir.

Q. And the amount of the American National Bank's indebtedness to depositors which was assumed by the Union National Bank, and for which the Union National did not get money, or other assets of the American National Bank, would be a liability on the part of the Union National Bank for which they would have to have some form of assets?

A. Yes sir.

Q. Now, is it not true, that these three notes were executed for the purpose of giving them assets to offset that liability in view of the fact that the other assets of the American National Bank, which the Union

National Bank did not take absolutely, passed, nominally, at least, into the hands of Thomas L. Kimball, trustee?

A. It is true, that those notes were given to the Union National Bank for the purpose of off-setting the liability which the Union National Bank assumed in payment of the deposits of the American National, to the extent of those notes."

MR. WYMAN testified, commencing at the bottom of page 176:

"Q. The Union National had then taken possession of the office rooms occupied by the American National?

A. Yes sir.

Q. And the assets of the American National which were turned over to the Union National were kept in that office?

A. Yes sir.

Q. And kept in the same vault with the Union National Bank's business?

A. Yes sir.

Q. Now, when the transfer was made, December 21, 1895, the Union National took all of the cash items held by the American National Bank, did it not, in its own possession?

A. Yes sir.

Q. And all of the bills receiveable of the American National Bank which the Union National Bank decided to accept in lieu of cash, or as the equivalent of cash?

A. Yes sir.

Q. And the Union National, at the same time, carried on its books, all the deposit accounts of the American National, did it not?

A. They were transferred from the American National to the Union National, yes sir.

Q. So they would show a liability on the part of the Union National Bank to the depositors of the American National Bank?

A. Yes sir.

Q. So you deducted the assets which the Union

National accepted as cash from this liability assumed by the Union National, in order to ascertain the amount for which these notes were given, these three notes marked Exhibits 2, 3 and 4?

A. Yes sir.

Q. Is it not true, Mr. Wyman, that the Union National desired those three notes merely for the purpose of showing assets to offset the liability which it had assumed in excess of the cash and bills receivable which it had accepted as cash from the American National Bank?

A. I could not answer that question, as I was not in touch with the officers of the Union National Bank on matters of this contract. I did not know what their intentions were.

Q. It is true, is it not, Mr. Wyman, that at the time of the execution of these notes, December 23, 1895, the American National Bank did not owe to the Union National Bank $201,000, or any portion of that sum?

A. Well, we had turned them over all our assets.

Q. Still the American National Bank did not owe that sum, or any portion of it, did it?

A. I do not know how to answer that question.

Q. Well, if you have any doubt about it, will you state anything out of which that indebtedness arose, or any part of it?

A. The indebtedness arose through the assumption by the Union National Bank of the deposits and bills payable, and other indebtedness of the American National Bank.

Q. Now, on December 23, 1897 (1895) the Union National Bank had not paid these deposits, had it?

A. No; they had not paid them.

Q. They had merely agreed to assume them and had given notice of its assumption?

A. Yes sir.

Q. So there was no indebtedness whatever between, or from the American National Bank to the Union National Bank, unless it arose out of this contract of December 21, 1895?

A. That is the only way it arose."

MR. RAINEY testified, commencing at the bottom of page 192:

Q. "When the Union National Bank moved into the offices of the American National Bank and took possession, it immediately transferred from the books of the American National, all deposit accounts showing balance due the depositor, to the books of the Union National Bank?

A. Yes sir.

Q. So that, so far as the bookkeeping was concerned, the former depositors of the American National Bank then became depositors of the Union National Bank?

A. Yes sir.

Q. And had the same credits standing upon the books of the Union Natinoal Bank?

A. Yes sir.

Q. Any depositors of the American National Bank who came in and wanted his money got it from the Union National Bank?

A. Yes sir.

Q. But if he was willing to, he simply continued his business with the Union National Bank?

A. He did, yes sir.

Q. Checking against the balance transferred from the books of the American National and making deposits in the Union National Bank?

A. Yes sir."

Construing the notes and the agreement together, it is believed to be clear beyond controversy they constitute a guaranty by the American National that the Union National would realize out of the assets of the American National, by its liquidation of them, $67,000 in one year, a like sum in two years, and a like sum in three years, and that they can not be otherwise interpreted.

If the American National had been borrowing money to tide it over its embarrassment, due to the apprehension that the payment of some of its larger depositors

accounts would be demanded, it would not have borrowed a sum equal to the *whole* of its liabilities; it would not have *sold*, absolutely, its *business*, its *furniture and fixtures;* it would not have transferred the whole of its *cash* and *cash items*; it would not have surrendered its *offices* and transferred the *whole of the remainder of its assets* to the Union National for liquidation; it would not have made any agreement procuring another corporation to assume payment of its liabilities, and to liquidate such assets.

The Circuit Court interpreted the opinion in *Schofield vs. State National Bank*, 38 C. C. A. (8th Circuit) 179; 97 Fed. 282, as authority for the conclusion that the transaction between the banks was a lending of money by the Union National and the borrowing of money by the American National; and, relying upon *Auten vs. United Stated National Bank*, 174 U. S. 125, and *Aldrich vs. Chemical National Bank*, 176 U.S. 618, as authoritatively settling the proposition that borrowing money by a national bank is not out of the ordinary course of the banking business, it reached the conclusion that the transaction in controversy was not *ultra vires* the American National, and was in the usual course of business. But if it be granted that the Circuit Court correctly interpreted the Schofield case, the conclusion is not sound. If the money be borrowed in the usual course, and in furtherance, of the *authorized* business of the borrowing bank, the transaction will be *intra vires;* so, if it be not so borrowed, but the lending bank believes it to be, and is justified by the facts within its knowledge in so believing, *ultra vires* is no defense in a suit by the lending bank.

United States National Bank vs. First National Bank, 24 C. C. A. (8th Circuit) 597; 49 U. S. App. 67.

These principles controled the opinion of this court in the case of *Auten vs. United States Bank* (which is the same case as *United States National Bank vs. First National Bank*), and in *Aldrich vs. Chemical National Bank.*

But if money be borrowed for an *unauthorized* use and the lending bank is aware of all of the facts, and a participant in the wrongful purpose, even though the transaction be formally authorized by the Board of Directors of each bank, it will be *ultra vires* and not enforceable, and the statutory liability of the shareholders cannot be enforced to satisfy the loan. This is the principle which, if the transaction was a borrowing of money by the American National, is applicable to the case at bar. The UnionNational Bank knew all of the facts and was a participant in the illegal purpose of the transaction. The *whole* of the transaction must be considered, and if I am correct in my contention, that a national bank, when confronted with the fact that it is unable to continue in business, has no power to renounce its own functions and powers and transfer the whole of its assets to another bank for liquidation, then it is equally true that it has no power to borrow money in furtherance of such a purpose, and the promise to pay, if the lending bank knew of and was a party to the unauthorized purpose, would be void and no obligation could arise out of the transaction that could be enforced against shareholders.

But I am not willing to concede that the transaction in controversy was a lending of money by the Union National and a borrowing by the American National, or that the opinion in *Schofield vs. State National Bank* is authority for that contention. That question was not before the court in that case for decision. In that case,

the State Bank transferred its furniture, and cash items to the Union Bank, amounting to $67,803.56, absolutely, and transferred bills receivable amounting to $564,000, as security, making an aggregate of $631,803.56, but retaining assets amounting to $245,446.80. The Union Bank agreed to assume and pay the debts of the State Bank, for borrowed money and deposits, which amounted to $560,641.64, and to account for any surplus it might realize out of the security. Both banks afterwards became insolvent, and the Receiver of the Union Bank came into possession of the bills receivable, transferred to it by the State Bank amounting to $279,552.95. He tendered these back, and sued to recover the difference between the amount of the debts of the State Bank assumed by the Union Bank, and the amount realized by the latter from the securities which had been converted. There was no promise by the State Bank to pay any such difference, and the shareholders of the State Bank were expressly released from individual liability, by the agreement. The receiver sought to rest an implied promise by the State Bank to pay such difference on the ground that the contract of the Union National Bank was *ultra vires*. There was no question raised as to the validity of any promise of the State Bank or the liability of its shareholders, because there was no such promise or liability. The Court of Appeals, said in the opinion, that there were many fatal objections to the Receiver's contention, and among them, that there was nothing in the contract of the Union Bank that was beyond its powers, and, while it is true that in support of this conclusion, the opinion does (*arguendo*) treat the transaction, as far as the Union Bank is concerned, as a lending of money, it was not said that the transaction was on the part of the State Bank a borrow-

ing of money. To the contrary, it was expressly held that the State Bank was not bound by either express or implied promise to repay, and therefore, it could not have been a borrower.

There are obvious distinctions between that case and the case at bar. There was not in that case, any abdication by the State National Bank of its own powers and duties, and guaranty of liquidation of the whole of its assets by others, thereby prolonging, by creating an entirely new obligation, the liability of shareholders of the State Bank. The State Bank did not transfer the whole of its assets to the Union Bank, under an agreement to liquidate the whole, but transferred without endorsements bills receivable of the face value of $564,000, as security against liabilities assumed, amounting to $492,838.08, the Union Bank agreeing to account for any surplus it should receive out of the securities, and the State Bank retaining assets of the face value of $245,-486.90. The transaction was more in the nature of an absolute sale of its business and a part of its assets, and a pledge of another part, but not of the whole, by the State Bank. The Union Bank, in that case, did not occupy the position of the American National in this, much less, the position of shareholders; but so far as the case is parallel at all, the Union Bank occupied the position of the Union National in this case, and its receiver, asserting what he claimed were the rights of the Union Bank, was pleading *ultra vires* in order to defeat its own contract.

In *United States National Bank vs. First National Bank*, 24 C. C. A. 507; 49 U. S. App. 67, the United States National Bank (termed in the opinion the "New York Bank"), had, at the request of the First National Bank, (termed in the opinion the "Little Rock Bank")

re-discounted paper at various times to a large amount, believed, and represented, to belong to the Little Rock Bank, whose endorsement was written on the paper. It turned out, however, that a part of the paper did not belong to the Little Rock Bank, but was fraudulently endorsed by its President. The suit was to charge the bank on the endorsement. It had previously been held by this court (*Western National Bank vs. Armstrong*, 152 U. S. 346), or at least the opinion was so understood by the Little Rock Bank, that the borrowing of money by a bank, though within its corporate powers, was so far out of the course of ordinary and legitimate banking business that it put the lender upon inquiry as to the authority of the officer or agent of the borrowing bank. The Little Rock Bank, therefore, claimed the transaction was, on its part, a borrowing, and on the part of the New York Bank, a lending of money, and that the president of the Little Rock Bank had not been authorized by its Board of Directors. The trial court had charged the jury that the transaction was a borrowing of money, and that the president of the Little Rock Bank had no implied power to endorse the paper, so that the Court of Appeals was discussing the question, whether the transaction was or was not a lending on one side, and borrowing on the other. In the opinion it is said (49 U. S. App. 71):

> "We are of the opinion that that part of the aforesaid charge which declared that a re-discount by a bank of its bills receivable, if it endorsed the same, is a borrowing of money, and that part which declared, in substance, that a president of a national bank has no implied power to endorse its commercial paper, were erroneous. There is an obvious difference between a transaction where a bank goes in the market without giving its own notes, bills or other obligatons for the money, and a transaction

where it disposes of the notes and bills of third parties which it has previously discounted. In the former case, it becomes primarily bound; it is the principal debtor; while in the latter, even if it endorses the paper, it only incurs a contingent liability which may never ripen into an absolute obligation to pay. The latter transaction has more, if not all, of the characteristics of a sale, and it is generally regarded as a sale whereby assets of a certain kind are converted into cash. It may properly be said that a bank or individual borrows money when they execute their own notes and bills and receive the money thereon, from a third party, even though the interest to accrue is deducted in advance in the form of a discount; but we can see no propriety in characterizing a transaction as a borrowing of money where a person or corporation sells commercial paper made by third parties, which he or it happens to own."

Considering the expressions contained in the opinion in these two cases by the same court, they prove the wisdom of the rule, "that the authority of general expressions and broad statements in the opinions of courts is always limited to the single question which they were considering and deciding when they were used," a proposition which does not require citations.

It is true, that in the case at bar, the American National executed and delivered what, in form, were promissory notes, obligating itself to pay money, but it has already been shown that these so-called promissory notes were merely parts of an agreement to guarantee against loss, and that there was not, in fact, any existing indebtedness, or anything received by the American National but the promise of the Union National, or any primary obligation on the part of the American National agreed upon between the parties.

The power of National Banks to lend and borrow money is defined and limited by sub-division 7 of Section 5136, R. S., as follows:

> "SEVENTH: To exercise by its Board of Directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title."

It can not be seriously claimed, I think, that the acts of the American National were done in, or incidental to, carrying on the business of banking, in the sense of this provision; and it seems impossible to find anything whatever in the transaction justifying the conclusion that the acts of that bank constituted a borrowing of money within its powers to carry on the business of banking. There was no debt owing from the American National to the Union National at the time of the transaction. The American National did not expect to pay, nor did the Union National expect to receive, any money, otherwise than through the conversion of the assets into money. The obligation assumed by the American National was not intended to be a primary obligation. Each bank thought the assets more than sufficient to secure a sum equal to the liabilities assumed by the Union National. As the matter stood at the date of the notes (December 23, 1895), the Union National had all of the assets of the American National, and in addition its three notes for $67,000 each, and the "cashier's check" for $39,929.51, had not paid a dollar, and the American National had nothing.

The bald and indisputable fact is that the American National, through its board of directors and officers, undertook to dispose of all of its assets, and immediately

cease all business and to renounce all control and management of its affairs; to procure the Union National to liquidate its assets, exercising unlimited discretion; and to guarantee that the Union National would, as a result of the liquidation of these assets, realize a sum at least equal to the amount of the debts assumed by it. It was an abandonment of all its powers and functions by the American National, and an attempt to create a new obligation in furtherance of such abandonment, which, if its shareholders are to be held liable individually, would extend their liability for years. These important features of the agreement were completely elminated from consideration by the Court of Appeals.

Can a national bank, by guaranteeing the results of such a transaction, create an obligation for which shareholders are liable under the statute?

In *Richmond vs. Irons*, 121 U. S. 27, the President of the bank, after the bank had gone into liquidation, and, as he supposed, in the due course of liquidation, settled with some creditors by transferring to them paper held by the bank, but he endorsed on the paper, in the name of the bank, a guaranty of payment or the equivalent. The question was, whether the obligation thus created in the name of the bank and for which the bank received an equivalent in settlement, was one which could be included in the sum for which shareholders were individually liable, and it was held that it was not such an obligation. At page 59 it is said:

> "Those creditors who made settlement after the bank was put into liquidation and received from the president for that settlement, paper of the bank, or, as in some cases, the individual notes of Holmes himself, endorsed or guaranteed in the name of the bank, are not to be considered as creditors of the bank entitled to subject the shareholdes to individual

liability. The individual liability of the stockholders, as imposed and expressed in the statute, is, indeed, for all the contracts, debts and engagements of such association, *but that must be restricted in its meaning to such contracts, debts, and engagements as have been duly contracted in the ordinary course of its business.* That business ceased when the bank went into liquidation; after that, there was no authority on the part of the officers of the bank to transact any business in the name of the bank, so as to bind its shareholders, except that which is implied in the duty of liquidation, unless such authority had been expressly conferred by the shareholders. No such express authority appears in this case, and the power of the president or other officer of the bank to bind it by transactions after it was put into liquidation, is that which results by implication to wind up and close its affiairs. That duty consists of the collection and reduction to money of the assets of the bank, and the payment of creditors, equally and ratably, so far as the assets prove sufficient. Payments, of course, may be made in the bills receivable and other assets of the bank, in *specie*, and the title to such paper may be transferred by the president or cashier by an endorsement suitable to the purpose, in the name of the bank, but such endorsement and use of the name of the bank is in liquidation, and merely for the purpose of transferring title. It can have no other effect as against the shareholders by creating a new obligation. It does not constitute a liability, contract, or engagement of the bank for which they can be held to be individually responsible. Every creditor of the bank, receiving its assets under such circumstances, knows the effect of liquidation, and is chargeable with knowledge of its consequences; he takes the assets received at his own peril; he is dealing with the officers of the bank only for the purpose of winding up its affairs. If he accepts something in lieu of an existing obligation, looking to future payment, it must be from other parties. *It is not within the power of the officers of the Bank, without express authority, by such means to prolong indefinitely an obligation on the part of the shareholders which is imposed by the statute only as a means of securing payment of debts by an insolvent bank, when it is no*

longer to continue business, and for the purpose of effectually winding up its affairs. This is the very meaning of the word liquidation."

In the case at bar, the American National was unable to proceed in business. Its assets had become a trust fund for creditors and shareholders. It resolved to cease business, not by voluntary liquidation through its own authorized officers, and by the execution of its own powers and performance of its duties, nor by applying to the Comptroller to take charge of and liquidate its affairs, either of which would have been within its powers, but by transferring the whole of its assets to the Union National and by devolving upon that association the power and duty to administer the trust which the law devolved upon its own officers. Simultaneously with this renunciation of its powers and duties, it undertook to create an entirely new obligation, not in the ordinary course of its banking business at all, but in the surrender and abandonment of it, by guaranteeing to the Union National the result of the liquidation of the assets by that corporation. It is true, the agreement provided for participation of Kimball in the liquidation of its assets; that is, the two corporations, through their respective boards of directors, undertook to clothe him with some power resembling that of an agent for both, as well as the shareholders of the American National. It can not be said however, that the agreement made Kimball a trustee of the assets in any other sense than every agent is a trustee, for he took no title to these assets in trust or otherwise. By the terms of the agreement Kimball was to "receive, hold and use the *proceeds* of the assets", as trustee of the parties, "for the mutual protection of the rights of each", under the agreement. The assets were "sold and assigned" to the

Union National Bank, but as "further security" to the guaranty of the American National against loss by reason of the assumption of liabilities, and while witnesses for plaintiff, testifying to mere conclusions, said that the assets were turned over to Kimball as trustee, the undisputed fact was that the Union National Bank immediately moved into the rooms previously occupied by the American National and took possession pursuant to the agreement.

The provision of the agreement by which the Union National agreed, unqualifiedly, to liquidate the assets thus taken, without charge or expense to the American National, and the provision that such liquidation should be conducted under the direction of Kimball (or such other person as should be agreed upon) on behalf of the stockholders of the American National; and the transfer by the American National of all of the assets to the Unnion National as security subject to the right of Kimball or his successor to convert them into money for the purposes of the agreement, seem to be hardly consistent. But the American National had no power to name a person to represent its shareholders or to invest him with any power to bind them, nor had it power to bind *itself* by agreement with the Union National that Kimball or any other person should represent the shareholders. They had already chosen their own representatives for the management of all of the affairs of the association when they selected a board of directors, and had the right to choose such representatives at each annual meeting, and it was the legal duty of such board, so chosen, to manage the affairs of the bank, including the liquidation of its assets.

The true interpretation of these provisions is, I think, that, while the Union National Bank was re-

quired to liquidate the assets thus taken, it was also required to employ Kimball to take charge of and direct the liquidation. But whether we give the greater force to one or the other of these provisions, the controlling fact remains, that by its agreement, the American National divested itself and its board of directors of all control over the whole of its assets, placed them in the possession of the Union National Bank and invested that association and Kimball with unlimited discretion, renouncing its own powers, and undertook to obligate itself by a guaranty against the disasterous result already shown. It is not important to whom the discretion was delegated, as, under the agreement, the delegation was so complete and absolute that the directors of the American National could not even remove and appoint a successor to Kimball without the consent of the Union National.

Schrader vs. Manufacturer's Bank, 133 U. S. 67, is a case which grew out of the same facts as *Richmond vs. Irons*, *supra*. In that case a creditor had obtained judgment against the liquidating national bank on his claim. The claim was founded upon an agreement made in its name by the president of the liquidating bank, *continuing* a guaranty by the bank, this agreement being made after the bank had gone into liquidation. A judgment had been obtained against the bank on the continued guaranty, and suit was brought to charge the shareholders for the amount of the judgment. It was held that the judgment against the bank was open to examination as to the individual liability of the shareholders therefor, and that the shareholders were not liable, and the language above quoted from *Richmond vs. Irons*, is reiterated in the opinion.

In *Ward vs. Joslin*, 186 U. S, 142, The Western In-

vestment, Loan & Trust Company, a Kansas corporation, guaranteed the payment of promissory notes for a valuable consideration. The officers of the company were authorized by the directors to guarantee payment of promissory notes negotiated by the company; but the notes guaranteed were not so negotiated. Judgment was obtained against the corporation in a state court of Kansas, on the guaranty, and the corporation paid a part of that judgment. Suit was brought to recovor the unpaid portion of the judgment in the Circuit Court of the United States for the District of New Hampshire, against a shareholder of the corporation, by enforcing such shareholder's individual liability created by the constitution and laws of Kansas. The Circuit Court ruled (100 Fed. 676) that the obligations of the corporation for which shareholders were made liable by the constitution of Kansas (which described the obligation by the use of the word "dues") were such only, as resulted from the legitimate and contemplated business of the corporation; that is, contemplated by the members or shareholders as shown by the articles of association, and that the guaranty in that case was not such an obligation and was not within the authority given by the directors to the president and secretary; also, that the judgment against the corporation did not estop the shareholder, and that he was *not* liable. The Court of Appeals affirmed (105 Fed. 220). This court also affirmed. The opinion contains the following (p. 151):

> "Can an obligation which a corporation had no right to incur be a contractual obligation, and the basis of 'dues', as that word is used in the state constitution? We do not think so. It appears to us that it was not intended by that instrument to impose individual liability on stockholders in respect to risks which they had not undertaken. One of the

> grounds on which the doctrine of *ultra vires* rests, is that the interest of the shareholders ought not to be subject to such risks. Rights of stockholders must be considered, as well as those of creditors, and they should not be held directly liable, unless such liability was within their contract in legal contemplation."

The obligation sought to be enforced in the case at bar is no more within the risks assumed by shareholders or, in legal contemplation, within their contract as shareholders, than the obligation in the case cited was, and it will certainly be a surprise to shareholders in the national banks of the country when they learn that these associations have the power by such agreements to subject them to such risks.

Shareholders become members of a national bank corporation with the law and the articles of association before them. They do not assume or contemplate risks or liabilities which are not imposed by these; and it is settled by the foregoing cases, that when the obligation is *ultra vires*, or when, though not a prohibited transaction, it was not, in the language of *Richmond vs. Irons*, "duly contracted in the ordinary course of business" of the corporation, the shareholders of a national bank can not be held individually liable. The statutes governing these institutions do not contemplate the making of any such obligations by them, and, therefore, Congress can not be said to have intended to impose a liability on the shareholders; nor can the shareholders be said to have intended to assume the risk of such liability.

> "It is well settled that the United States statutes relative to national banks, constitute the measure of authority of such corporations, and that they can not rightfully exercise any powers except those

expressly granted, or which are incidental to carrying on the business for which they are established."

California Bank vs. Kennedy, 167 U. S. 362-366.
Concord Bank vs. Hawkins, 174 U. S. 366.

It was held, therefore, in the case of the California bank, just cited, that a national bank was not liable as a shareholder in another corporation, because of shares held by it, although it had taken dividends on the shares; and it was said that a *prohibition* to acquire the shares was *implied from the failure to grant the power*. It was also said in that case (p. 369):

"The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers expressly conferred. A dealing in stock is, consequently, an *ultra vires* act. Being such, it is without efficacy."

The same principle, it is obvious, applies to every act attempted by a national bank, which is neither expressly conferred upon it by the statute, nor one which may be exercised as incidental to the powers expressly conferred.

Concord First National Bank vs. Hawkins, 174 U. S. 364, and cases cited.

By Section 3156 R. S., it is provided that upon making and filing articles of association, and an organization certificate, the association shall become a body corporate with certain powers (specifying them); but it is not to transact any business, except such as is incidental and necessarily preliminary to its organization, until the Comptroller of the Currency has authorized it "to commence the business of banking." This provision has been construed by this court.

In *McCormick vs. Market Bank*, 165 U. S. 538, the bank was duly organized, its articles of association providing for $100,000 capital, and it had procured a seal, but had *not* received the certificate of the Comptroller permitting it to "commence the business of banking." It entered into a contract, duly executed under seal, for the lease of a building to be used for its office, and "for no other purpose." The lessor expended money in putting the building into condition as required by the terms of the agreement, and he believed that the bank was duly authorized to make the contract. The bank went into possession. The Comptroller refused a certificate, because the capital was not, in fact, paid as required by law. The lessor sued for rent; but the contract was held to be, on the part of the bank, *ultra vires* and void. It was said in the opinion (p. 549):

> "The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers, is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three definite grounds: the obligation of any one contracting with the corporation to take legal notice af the legal limits of its powers; the interest of stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transend the powers conferred upon it by law."

The rule that the United States statutes create the measure and prescribe the limit of the powers of the national banks, has never been departed from by this court, and in the application of that rule, no act has ever been recognized as incidental, unless it was *necessary* to the exercise of powers expressly granted. The rule of this court is, in respect to these statutes, that the failure to grant a power prohibits, by implication, its exercise.

The incidental powers which may be exercised by such association are expressly defined by sub-division 7 of Section 5136 R. S. to be such as *are necessary to carry on the business of banking.*

By Sections 5145, 5146, 5147, 5148, R. S., Congress provided:

(1) That the "affairs" of each national bank *shall* be managed by a *Board of Directors.*

(2) That these Directors shall be *elected by the shareholders.*

(3) That they shall hold office for *one year.*

(4) That three fourths of the Directors shall reside in the state during their term.

(5) Each Director must own at least ten shares of stock.

(6) Each must take an oath to diligently and honestly administer the affairs of the association, and in accordance with the acts of Congress.

(7) That a vacancy in the Board shall be filled by appointment made by the remaining Directors.

Every shareholder of the American National, when he became a member of the association, was assured by these provisions that the "affairs" of the association could only be managed by its Directors, thus chosen and thus qualified, and every person contracting with the bank was bound to know that these provisions were limitations upon the powers of the bank.

By Section 5220 R. S. national banking associations are empowered to "go into liquidation and be closed" upon the vote of their shareholders owning two-thirds of the capital stock.

To "go into liquidation and be closed" means nothing less than the winding up of the "affairs" or business of the association, and this is the method provided

for doing this *voluntarily*. The "liquidation" and "closing" of the association by its own voluntary action, is as much a part of the "affairs" of the association, to be managed by its own Directors, as is the current business of a going concern. Such liquidation requires the continuous exercise of judgment and discretion in the interest of shareholders as well as creditors. When the Congress, in broad and mandatory language required the "affairs" of an association to be managed by a Board of Directors it did not execpt, or intend to except, the important and delicate business of liquidating and closing its affairs, requiring even greater care than a going business. The power given to the association is a power to be exercised by its own Board of Directors. The law is an assurance to shareholders and notice to the public, thal *all* of the affairs of the association shall be managed (not in every detail, but in the sense of control, supervision and direction) by a Board of Directors selected by the shareholders, chosen for a short period of time, subject to removal, having pecuniary interest in the event of their management, and each acting under oath. Powers and duties requiring the exercise of such discretion and judgment, when devolved by law upon such a body, can not be delegated, much less can the result of such delegation be guaranteed by the corporation.

But the association did, in the case at bar, acting by its Board of Directors, delegate, or undertake to delegate, all of its powers. It reserved none whatever. It bound itself to surrender everything—all of its assets and all power to manage or control them. It gave to the Union National Bank and Kimball (who acted not as president, but as an alleged trustee or agent for conflicting interests) the greatest conceivable discretion, unlimited as to time and scope, to liquidate and close,

and thereby to "manage," the "affairs" of the association. It remitted creditors and shareholders to the discretion and judgment, integrity and responsibility, of the Union National and Kimball for the protection of their rights, and having made this obviously illegal arrangement, it undertook to guarantee that the exercise of these delegated powers and discretion, by them, should produce no loss to the Union National on account of the liabilities which, in order to get the business of the American National, it had assumed the payment of. It undertook to enlarge and prolong the liability of shareholders indefinitely.

No prohibitory provision of the law is more emphatic than that which requires the affairs of a national bank to be managed by its Board of Directors, and it is difficult to conceive a case coming more clearly within that prohibition than is found in this record. The guaranty was not only a guaranty of the value of the assets, but a guaranty against errors of judgment, lack of dilligence and foresight, even negligence and maladministration (which may often exist when it can not be proven) of the Union National and Kimball.

Was not the agreement of December 21, 1895, clearly and indisputably *ultra vires?*

Was it not clearly and indisputably one which, in the language of the opinion in *Richmond vs. Irons*, was not "duly contracted in the ordinary course of its business"?

Was it not one which the Union National accepted at its peril?

It seems that each of these questions must be answered in the affirmative, and that it has been conclusively shown that the demand is not one for which shareholders are individually liable, unless this conclu-

sion is affected by subsequent ratification by the shareholders. The case, I think, falls clearly within the principle decided many times by this court, holding agreements made by corporations to be *ultra vires*.

Central Transportation Co. vs. Pullman Car Co., 139 U. S. 24, and cases there cited.

In the case last cited, it was said (p. 59):

> "A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore, beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract can not be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

That case was decided after examination of many cases cited in the opinion, and the language above quoted has been repeatedly referred to in later opinions, and has become the settled rule, in this court.

It is said in the opinion of the Court of Appeals (page 399):

> "When the contract was entered into, the American National was confronted by an emergency. The withdrawal from the bank of a large amount of deposits was anticipated, and it had not the money or available cash resources to meet it and thereafter continue business. At the time, as subsequent experience demonstrated, the bank was, in fact, hopelessly insolvent. But in the light of the conditions which were known, it was within the power of the officers and directors of that bank to make the contract of December 21, 1895, with the approval of the shareholders owning a larger proportion of the capital stock than was necessary under the law in the case of a voluntary liquidation."

The proposition that a national bank, when it has become insolvent, or is no longer able to proceed in business, has power, with the consent of shareholders owning more than two-thirds of its shares, to surrender its assets to another bank for liquidation, with a guaranty against loss, as in this case, is, I respectfully think, in conflict with the principle established by the decisions of this court already cited. If a national bank can so renounce its powers and duties in favor of another bank, it can do the same thing in favor of any other corporation or individual it may select, in or out of the state in which the bank is located. This would certainly be a very dangerous power and one which should not exist. In creating these institutions, Congress endeavored to provide safeguards for the public and for shareholders by limiting their powers, by providing for the management of their affairs by a Board of Directors, each member sworn to discharge his duties according to law, and by providing for voluntary liquidation by an association through its own officers, and for compulsory liquidation by the Comptroller of the Currency through the appointment of a receiver in cases of insolvency. If an insolvent national bank may enter into such an agreement as the one made in this case, it is difficult to see what it may not do in the absence of *express* prohibition. But the rule is firmly settled by the decisions of this court that a power not granted is prohibited by implication.

First National Bank vs. National Exchange Bank, 92 U. S. 122.

California Bank vs. Kennedy, 167, U. S. 362.

Concord National Bank vs. Hawkins. 174 U. S. 364.

In *Concord National Bank vs. Hawkins*, just cited,

the question was as to the power of a national bank to acquire the shares of another national bank by purchase or as an investment, and its liability to an assessment upon such shares as the owner of them—individually liable as a shareholder. The principal reason given for denying the power and the liability, was that the law required that at least three-fourths of the Directors of a national bank must reside in the state where tho bank is located. It was said in the opinion in that case (p. 368):

> "One of the evident purposes of this enactment is to confine the management of each bank to persons who live in the neighborhood, and who may, for that reason, be supposed to know the trustworthiness of those who are to be appointed officers of the bank, and the character and financial ability of those who may seek to borrow its money. But if the funds of a bank in New Hampshire, instead of being retained in the custody and management of its Directors are invested in shares of a bank in Indiana, the policy of this wholesome provision of the statute would be frustrated. The property of the local stockholders, so far as thus invested, would not be managed by Directors of their own selection, but by distant and unknown persons."

The Court of Appeals has not, in its opinion, pointed out any reason why the case at bar is not controlled by the rule that a power not granted, nor necessary to the exercise of a power that is granted, is prohibited by implication, and, in view of the fact that the law has expressly granted the power to these associations to voluntarily liquidate through their own officers, and power to the Comptroller to compel liquidation by the appointment of a receiver, the power attempted to be exercised in this case is as clearly prohibited by implication as in any of the cases cited.

By the denial of this power, the association is not held to be helpless and incapable of an act of duty to creditors and shareholders, as is suggested in the opinion of the Court of Appeals. If, as is said in that opinion (p. 400), one creditor was merely substituted for many, by the guaranty and agreement in this case, it is not easy to perceive that "any act of duty to creditors" was contemplated by the agreement, and the result of the transaction certainly proves that it was a most unfortunate proceeding for the preservation of the interests of either creditors or shareholders. The powers which the American National was capable of exercising, as an act of duty to the creditors and shareholders, were the power to itself liquidate its own affairs, and the power to advise the Comptroller of its insolvency and thus have its affairs liquidated. These are the methods prescribed by the law for the discharge of the duty of an insolvent national bank to its creditors and shareholders.

Nor, I respectively think, is it correct to say, as seems to have been assumed in the opinion of the Court of Appeals (p. 399), that the expression, "duly contracted in the ordinary course of its business", quoted herein from the opinion of this court in *Richmond vs. Irons*, is referrable only "to the activities of a going concern", and is without application to a national banking corporation which has become unable to proceed in business. That expression was employed by this court in the case referred to, not to mark the limitation of the powers of a national bank, but to mark the limitation of individual liability of shareholders in such associations under Section 5151. In *Richmond vs. Irons*, and *Schrader vs. Bank*, this court applied the expression to transactions in the name of an insolvent national bank

in actual liquidation, and I do not see any distinction between an act of this character in the name of a bank in actual liquidation and one which is done after insolvency and as the inception of liquidation, the fact being known to both parties. Indeed, insolvency does not seem to be a necessary factor if the transaction be, otherwise, one which is not duly contracted in the ordinary course of the business of the bank. What this court settled in those cases is, that the individual liability of shareholders as fixed by Section 5151, does not extend to obligations created by transactions in the name of a national bank which are not "duly contracted in the ordinary course of its business". Transactions of this character may be entered into by, or in the name of, a bank that is entirely solvent, but if the character of the transaction is known to the other party, shareholders are not individually responsible. Insolvency and inability to proceed in business may contribute to make the transaction one not "duly contracted in the ordinary course of its business", but it is not necessary to the restriction. The limitation of the individual liability of shareholders under section 5151, is found in the intention of Congress, by the interpretation of that section, which is what this court did in the cases cited, and there seems to be no reason for saying that the individual liability of shareholders under this section is subject to different limitations, depending upon the necessities of the corporation. Of course, if the corporation be in actual liquidation its powers are limited to the business of liquidation, and obligations created by its officers must then, in order to continue or subject shareholders to individual liability, be "duly contracted in the ordinary course" of that business. But the same test or limitation of individual liability is applicable if the corporation be solvent, and

also when, being insolvent and unable to proceed in business it proposes to liquidate and close its affairs. In the case at bar, the association was insolvent and unable to proceed in business. It was proposing to liquidate and close its affairs. It had power to go into voluntary liquidation under Sections 5220 and 5221, and the "ordinary course of its business" then was, to liquidate and close its affairs through its own officers and under the control of its own Directors. But instead of doing this, it entered into the agreement and guaranty of December 21, 1895, which, appellant claims, was *ultra vires*, and not "duly contracted in the ordinary course of the business" of the corporation, and created an obligation for which the statute does not make him liable.

IV.

No principle of equity entitles plaintiff or Union National to be subrogated to the rights of depositors and bills payable creditors against the shareholders of the American National.

It is said in the opinion of the Court of Appeals (p. 400):

"Instead of many creditors to be dealt with, it was arranged that there should be one, whose demands should embrace those of all ofthe others. And in considering the relation of the Union National and the complainant, its assignee, to the American National, we need not stop at the three notes which they held. In the same sense that a shareholder may go behind a judgment recovered against his corporation, to show the character of the indebtedness which it represents, so, in a case like the one in hand, may a creditor, holding a note of the bank, show, if necessary, the nature of the debt which is evidenced thereby. In equity the claims

of the complainant and the Union National represent the contracts, debts and engagements' of the American National Bank, for which the shareholders of the latter are responsible, in accordance with the provisions of section 5151 of the Revised Statutes."

The bill is not framed for the support of this proposition and no authority is cited, or argument advanced, for the support of it in the opinion. It seems to *assume* that *all* debts due to depositors and bills payable creditors could have been enforced against shareholders and that plaintiff and Union National Bank are entitled to equitable subrogation

It was held by this court in *Schrader vs. Bank*, 133 U. S. 67, and in *Ward vs. Joslin*, 186 U. S. 142, that a shareholder was not estopped, by a judgment in favor of a creditor and against the corporation, from showing that the debt was one to which the statutory liability of shareholders did not extend. The question in those cases was, whether an adjudication in a suit between the creditor and the corporation, to which the shareholder was not a party and in which the character of the debt and the shareholders individual liability were not litigated, estopped the shareholder, and it was held that it did not. The debt was the *same debt* after judgment against the corporation as before. Before the judgment it was a simple contract debt; afterwards it was evidenced by record. But the obligation of the corporation as evidenced by the judgment was still created by the same facts and circumstances. There was the same creditor, the same debtor, and the same obligation. There was no *novation*—but an adjudication against the corporation. The shareholder was not, in those cases, claiming any right to subrogation, but was standing upon his obligation as created by the law.

There is no parallel between those cases and the case at bar so far as this question is concerned.

There seems to be no reason to doubt that the plaintiff and Union National Bank may go behind the notes and show the true character, and the whole, of the transaction out of which their claims arise. The appellant has done that himself.

But, are the plaintiff and Union National, after showing the whole transaction, entitled to relief based upon the rights of the depositors and bills payable creditors?

There is nothing in the *agreement* which gives them any such right.

The obligation of the American National which is sought to be enforced in this suit in behalf of plaintiff and the Union National, is not the same obligation as those which were due to depositors and bills payable creditors. There has been a complete *novation*—a new party as creditor, upon a new consideration, and upon entirely different terms. The Union National did not enter into the agreement of December 21, 1895, for the *accommodation* of the American National. By this agreement, the Union National got the business of the American National; removed a competitor; received interest amounting to approximately $70,000; got the banking office, furniture and fixtures of the American National, and got one-half of the loss on its own furniture and fixtures and on the lease of its former place of business paid by the American National, and time was extended.

The Union National agreed to *pay* and *extinguish* the debts due from the Americann National to depositors and bills payable creditors and such payment extinguished the individual liability of shareholders for those obligations of the corporation.

The Union National was a *volunteer*; that is, it did not pay these obligations as a surety, or for the protection of any rights of its own, but because it thought it a *profitable* venture.

There was no fraud or deception. The Union National entered into the transaction with its eyes open, with full knowledge of all of the facts, and charged with knowledge of the legal effect of the agreement; and there was no reason, legal or moral, why the shareholders of the American National should not have consented to or acquiesced in the agreement for the very purpose of extinguishing their individual liability. If the agreement had provided expressly for this it would have been valid and binding. Why, if this is the legal effect of it, should its legal effect be defeated by subrogation?

The Union National paid, it is true, the debts of the American National, but I do not see how this raises an equity in its favor to be subrogated to the rights of *creditors* against *shareholders*. One who pays the debt of another, by request of the debtor, may be entitled to be subrogated to the rights of the creditor when there is an *express agreement therefor*, by the debtor or creditor; but in this case, the American National could not by express agreement, have subrogated the Union National to the rights of creditors against its *shareholders*.

The proposition stated in the opinion, however, is not that the case is one of *conventional* subrogation, but subrogation *in equity*. But there is no principle of equity, in the absence of any agreement therefor, which entitles one who has paid a debt by the procurement of the debtor to be subrogated to the rights of the creditor. Every such person is a mere volunteer. In order to in-

voke the principle of equity, he must show that he was already bound and paid under necessity—that he was not in a position to elect whether he would or would not pay, but paid in order to satisfy an obligation, or to protect an interest or right, of his own.

In *Aetna Life Insurance Co. vs. Middleport*, 124 U. S. 534, the Town of Middleport issued bonds to a railroad company. The Insurance Company bought the bonds from the Railroad Company. It turned out that they were issued without authority and the Insurance Company set up a claim to suborgation in equity to alleged rights of the Railroad Company to recover the amount of an appropriation in lieu of which the bonds were illegally issued. At page 548, it is said:

> "But even if the case here could be supposed to come within the rule which requires the *payment* of a debt in order that a party may be subrogated to the rights of the person to whom the debt was paid, the payment in this case was a voluntary interference of the Aetna Company in the transaction. It had no claim against the town of Middleport. It had no interest at hazard which required it to pay this debt. If it had stood off and let the Railroad Company and the town work out their own relations to each other, it could have suffered no harm or loss. There was no obligation on account of which, or reason why, the complainant should have connected itself in any way with this transaction; or have paid its money, except the ordinary desire to make a profit in the purchase of bonds. The fact that the bonds were void, whatever right it may have given against the Railroad Company, gave it no right to proceed upon another contract and another obligation of the town to the Railroad Company."

The opinion also quotes from *Sheldon on Subrogation*, as follows:

> " * * * it (subrogation) is said to be a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as

still subsisting for the benefit of this third person, so that by means of it, one creditor is substituted to the rights, remedies and securities of another.* * *. It takes place for the benefit of a person who, being himself a creditor, pays another creditor whose debt is preferred to his by reason of privileges or mortgages, being obliged to make the payment, either as standing in the situation of a surety, or that he may remove a prior incumbrance from the property on which he relies to secure his payment. Subrogation, as a matter of right, independently of agreement, takes place for the benefit of insurers; or of one who, being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or for a co-obligor, or surety, who has paid the debt which ought, in whole or part, to have been paid by another."

Other cases are cited and quoted from in the opinion.

See also:

Wood vs. Guaranty Trust Company, 128 U. S. 416.

In *Railway Company vs. Wortendyke*, 27 N. J. Eq. 658, it is said:

"It is not sufficient that a person paying the debt of another should do so merely with the understanding on his part that he should be subrogated to the rights of the creditor. Conventional subrogation can only result from an express agreement of the debtor or creditor."

In *Sandford vs. McLean*, 3 Paige 122; 23 Am. Dec. 773-6, it is said:

"It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in place of the creditor, as a matter of course, without any agreement to that effect. In other cases, the demand of the creditor, which is paid with the money of a third person, and

without any agreement that the security shall be assigned or kept on foot for the benefit of such third party, is absolutely extinguished."

The conclusion stated in the opinion of the Court of Appeals is not, under the facts in this case, I believe, supported by any authority or principle whatever. There was not only no express agreement for subrogation, but it is indisputable that the parties to the agreement intended payment and extinguishment of the debts of the American National as fully as if they had been paid by the bank itself, and there is not a single fact found in the case upon which equity decrees subrogation in the absence of express agreement therefor. The Union National assumed the payment of the debts upon a consideration, for its own profit, and not for the protectien of any interest it already had, or for the discharge of any obligation already resting upon it. To apply the doctrine of equitable subrogation to the facts in this case would extend it far beyond its well established limits without any good reason, and merely to relieve the Union National and its assignee against a perfectly fair bargain, but which appears, at least, to have been converted into an unprofitable one by the negligence and bad management with which the Union National performed its agreement to liquidate the assets turned over to it, and would be granting such relief at the expense of shareholders who have the stronger claim to protection.

The appellant although he was elected a director of the American National in 1895, was not present and did not participate in making the agreement of December 21, 1895. That action was taken at a special meeting of the Directors (p. 255), on Saturday evening, and on the following Monday morning the Union National

had moved into the offices of the American National and had taken possession (pp. 154, 184, 192) under the agreement, and the matter had been given publicity. There is no claim that appelant had any knowledge whatever of the transaction or that it was contemplated, until, at least, some days after, when he signed the ratification paper (to be noticed further on), when shareholders were, practically, coerced by the situation into acquiescence. It seems impossible to point out any fact whatever upon which to rest an equity for subrogation to the rights of the creditors whose demands were paid, conceding, for the sake of argument, that all of such creditors could have enforced the satutory liability of shareholders.

V.

The judgments against appellant, in favor of complainant and Union National Bank, can not be sustained on the ground of either estoppel or ratification.

The averments of the amended bill are general and meager upon these questions, and the Circuit Court did not, in its opinion consider them. But the Court of Appeals rested its conclusion upon the ground of ratification.

A paper was introduced in evidence, for complainant, which is in the following words:

"The undersigned, owners of the number of shares of the capital stock of the American NationalBank of Omaha set opposite our respective names, hereby ratify and confirm the action of the directors of the American National Bank of Omaha in entering into and executing a certain agreement between said American National Bank and the Union National Bank of Omaha, a copy of which agreement is hereto attached."

(Here follows the signatures of a number of shareholders with the number of shares held by each, opposite his name, and a copy of the agreement of December 21, 1895. See Exhibit 25, page 277).

This paper was signed by the appellant and some other shareholders, at some time (not definitely proven) after December 21, 1895. But the complainant did not plead it as an estoppel, nor was it delivered to, or acted upon by, the Union National. It seems to have been procured by Kimall for a purpose unexplained in the record, but presumably, from its contents, in order to enable him, if any shareholders complained, to say that the holders of a majority of the capital stock had consented to the arrangement, and thus to justify the directors and himself.

There is not, in anything contained in this paper, or in any other action by shareholders, any ground for holding that any shareholder is estopped to assert that the obligation sought to be enforced in this case is one not within their statutory liability. The record shows nothing whatever done by appeallant, actively or passively, to mislead, or induce the action of, the Union National in entering into the agreement, and this paper is nothing more than consent that what had been done by the directors should bind *the corporation* to the extent of the assets—as the obligation of the bank; because it does not purport, and was not designed, to be anything more. The Union National was not mislead by any act of the appellant or any other shareholder. There was no fraudulent misrepresentation or any suppression of facts, and appellant's denial of individual liability is not inconsistent with his assent to the agreement. He is not repudiating the agreement; but denying his individual liability. The Union National entered into the agreement with its eyes open. It knew the ex-

tent of the authority and powers of the American National and the extent and scope of the individual liability of shareholders, as created by the law. It had no right to act, and it is not even claimed that it did act, upon any belief that the appellant or any shareholder had enlarged that liability. The fact that the corporation is estopped, conceding it to be so, does not affect the individual liability of shareholders, for the statute does not make the shareholders liable for obligations which the corporation has incurred without authority, but which it has become estopped to deny; nor for obligations which shareholders have ratified, but which the law forbids.

In *Ward vs. Joslin*, 186 U. S. 142 this court said (p. 151):

> "If, however, under the state decisions, the corporation would be held estopped from denying the liability, it does not follow that the stockholders must, therefore, be held liable, if the obligation was in fact incurred without authority. In other words, alleged liabilities incurred without authority, and which do not come within the meaning of the word 'dues', as used in the state constitution, can not be properly treated as brought within the scope of that word, simply because the corporation may be so situated as to be estopped from denying their validity."

It is perfectly clear that the paper signed by appellant was not intended to in any way enlarge the individual liability of any shareholder, There is no word in it relating to the subject. Concerning this paper, Mr. Wattles, who was president of the Union National, testified as follows (p. 242):

"Q. Mr. Wattles, how long after December 21, 1895, to your best recollection, was it that you first saw this paper which has been marked Exhibit 25, and last mentioned in your examination in chief?

A. As near as I can recollect, it was a day or two

before the meeting of the stockholders of the American National Bank that I saw the paper.

Q. And that meeting, you think, was February 26, 1896?

A. Yes, sir.

Q. Do you know who got up this paper marked Exhibit 25?

A. Yes sir.

Q. Who?

A. Mr. Kimball.

Q. At whose instance?

A. I do not know.

Q. Did he consult you about it, or you with him, before getting it up?

A. No sir.

Q. How do you know that he got it up?

A. He showed it to me before the meeting of the stockholders of the American, in reply to a question I asked him of the probability of a favorable vote to liquidate the bank. He showed me this paper at that time and said that more than the required amount of stock had approved this action and signified their approval by signing this paper, and he did not think there would be any doubt about the vote at the stockholders meeting.

Q. And was this paper gotten up and signatures procured with a view to ascertaining what the probable result of the meeting would be?

A. I do not think so.

Q. But you did not see it at all until about February 26, 1896?

A. A day or two before that as I recollect it,

Q. And it is your best judgment that it was gotten up and signed a day or two before this meeting?

A. No sir, I think it was gotten up immediately after the transaction was made, and signed during the next week or ten days after the transfer was made.

Q. Why do you think so?

A. From something that Mr. Kimball has said to me in regard to it.

Q. You do not know the date when it was signed by any of these stockholders?

A. No sir, I do not.

The stockholders meeting referred to by the witness was, in fact, held on February 25th instead of February 26th, 1896. There was no other testimony delivered bearing upon this paper, except that which tended to prove the signatures of some of the shareholders.

At the annual meeting of the shareholders held January 14, 1896, there was some informal reference to the agreement of December 21, 1895, but what is produced in evidence is the mere declaration of the person who kept the minutes, of what a few members of the meeting said. (See Exhibit 9, pp. 258-260). There was no action taken which can be said to have been intended to extend the individual liability of the shareholders to obligations for which the statute did not make them liable. It is true, that at this meeting action was taken directing the directors to take action "looking to the liquidation required by law." But this, already shown to have been a mere form, shows no purpose to enlarge the individual liability of shareholders, or of those participating and voting in the affirmative. Besides, the shareholders, as a collective body, have no power to enlarge the individual liability fixed by the statute. That is a matter which can only be effected by the individual action of each shareholder in his own behalf and in such manner as to constitute a contract by him.

There were two more meetings of the shareholders (pp. 264-274), but the subject of individual liability of shareholders was not mentioned, nor was the agreement of December 21, 1895, either mentioned or repudiated.

There were no other acts on the part of the appellant or any shareholder. But it may be conceded, that if the transaction was one which could be ratified, this was done, by the acts or silence of the shareholders, for *the corporation*, and so far as the *obligation of the corporation* is concerned.

It is, however, said in the opinion of the Court of Appeals (p. 398, bottom):

> "At no meeting of the shareholders, so far as the record shows, was there any word of criticism or objection to the transaction with the Union National, except so far as it may be gathered from the mere fact that a small number of shares were voted against the resolution for liquidation. When it is conceded that the Union National was engaged in carrying out its part of the contract, was disbursing its funds in taking up and carrying forward the contracts, debts and engagements of the American National, the duty of the shareholders of the latter in meeting assembled to then repudiate the transaction if they ever desired to do so, was imperative. * * *. Every consideration of equity, good conscience and justice leads to the conclusion that the shareholders should be held to have ratified and approved what was done and what was then being done."

Assuming this to mean that it was the duty of the shareholders to repudiate the agreement of December 21, 1895, in order to avoid individual liability, Is it sound? I will conceds that it was their duty to repudiate the agreement if they wished afterwards to resist or defeat performance *by the corporation*. But is it true that a shareholder must, when the corporation has made an agreement which does not involve him in any individual liability, when no claim is made against him, and when the subject is in no manner brought to his attention, repudiate the agreement of the corporation in order to avoid becoming individually liable? Does his silence, under such circumstances, enlarge the scope of the statute which fixes his individual liability and extend it to obligations not contemplated by the statute, or by the shareholder when he became a member of the association? As already stated, shareholders, as a collective

body, have no power to affect the individual liability by any means whatever. The most formal action upon the subject could not enlarge this statutory liability. Shareholders do not, by becoming members of the corporation, consent to the exercise of any such power. There is no such power in the corporation or in the body of shareholders. Each shareholder by becoming a member of the association consents to the individual liability which is imposed by the statute, but nothing less than his individual consent can enlarge this liability, and if that be given, he is not liable under the statute, but according to the terms of his consent.

The agreement, which it is said was ratified, did not purport to bind shareholders individually. It did not purport to be "duly contracted in the ordinary course of business" of the American National; and it showed on its face that it was *ultra vires*. Shareholders of the American National Bank had less reason to believe that the Union National was acting upon the belief that they were individually liable, than the Union National had to believe that the shareholders were acquiescing in this agreement upon the belief that they were not; and it is entirely incredible that the shareholders would have acquiesced if they had supposed that they were liable.

There was, therefore, nothing in the fact that these meetings were held, or in anything that transpired in the meetings, or at any other time, that made it necessary for the shareholder to repudiate the agreement to guarantee the Union National against loss in order to protect himself against an extension of his individual liability under the statute, to that agreement. The most formal ratification of this agreement by him was no more than consent to an agreement by the corporation, which, because it was not within the statute which de-

termined the individual liability of the shareholders, did not bind him individually—consent that the corporation be bound.

But, if the contention already made that the agreement of December 21, 1895, between the two banks, was *ultra vires* the American National, is sound, it was not the subject of ratification and would not support an action even against the corporation—excepting that, upon principles of estoppel, *the corporation* would be liable for the value of whatever it had actually received and enjoyed.

McCormick vs. Market Bank, 165 U. S. 538.
Central Transportation Co. vs. Pullman Car Co. 139 U. S. 24-51.
California Bank vs. Kennedy, 167 U. S. 362.

The broad doctrine, "that a contract not within the scope of the powers conferred on the corporation can not be made valid by the assent of every one of the shareholders, nor can it, by any partial performance, become the "foundation of a right of action," has been repeatedly approved by this court.

Thomas vs. Railroad Company, 101 U. S. 71-82.
Oregon Railway Co. vs. Oregonian Railway Co 130 U. S. 1-22.
Central Transportation Co. vs. Pulman's Car Co. 139 U. S. 24-56.
Ward vs. Joslin, 186 U. S. 142-151.

In the case last cited it was said by this court:

> "The rule in this court is that a contract made by a corporation beyond the scope of its powers, expressed or implied, can not be enforced, or rendered enforceable, by application of the principle of estoppel."

But the appellant has not sought to defeat the enforcement of the agreement, or of whatever liability may have grown out of it, by either party against the other, and mere ratification of that agreement by a shareholder, however complete, without any agreement for individual liability, would have no further effect than to permit such enforcement.

If the agreement be not *ultra vires* the American National, in the absolute sense, but is, nevertheless, one not "duly contracted in the ordinary course of business", still, no mere ratification of, or acquiescence in, that agreement, would enlarge the scope or effect of the statute which fixes the individual liability of shareholders, or create any liability independently of the statute. Ratification may estop shareholders from setting up the character of the agreement to enjoin or defeat performance or liability on the part of the corporation, but it could not affect a shareholders individual liability. That is created by the statute, not by the agreement of the association, nor by the ratification of such agreement.

As already stated, nothing less than the contract of the shareholder himself can enlarge his statutory liability, and then his liability would be fixed by, and upon the terms of, his contract, not by the statute.

If the obligation is not one which the statute declares shareholders individually liable for, as when *ultra vires*, or when it is "not duly contracted in the ordinary course of business" by the association, no ratification by shareholders will change its character or make it so, or bring it within the statute. As the making of the agreement between the parties does not, because of its character, create any individual liability of shareholders, so mere ratification of the same agreement could not. The inquiry must be directed to the scope and purpose of the

statute which fixes the individual liability, unless, by contract, the shareholder has bound himself for something different, which is not claimed in this case.

It is said in *Richmond vs. Irons*, (121 U. S. 60), that, after a national bank has gone into liquidation, its officers have no authority to transact any business in the name of the bank so as to bind its shareholders, except that which is implied in the duty of liquidation, unless such authority had been expressly conferred by the shareholders. But it is held in that case that the statute imposing individual liability, must be restricted to agreements "duly contracted in the ordinary course of business" by the bank, from which it follows, logically, that the officers can not, *at any time*, before or after the bank has gone into liquidation, transact any business in the name of the bank "so as to bind the shareholders" if the transaction be not "in the ordinary course of business", without authority is "expressly conferred by the shareholders"; that is, not only the authority to transact the business, *but the authority to bind the shareholders must be expressly conferred.* The statute is no more restricted in its meaning or scope after the bank has gone into liquidation than before. It means the same thing before as after liquidation is begun, *viz*: obligations created by the bank in the ordinary course of its business and within its granted powers, the only difference being that a transaction, which, before liquidation is begun, is within the ordinary course of the bank, may not be so afterwards. Congress did not contemplate these associations would ever create any other obligations, and provided for no shareholder's liability in respect to any other than such as are within their granted powers and incurred in the ordinary course of the business for which they were created.

The paper signed by appellant and other shareholders contains nothing in the nature of an agreement, by the shareholders who signed it, to stand individually liable for the obligation of the bank sought to be enforced in this case.

The present situation is due to the fact that the assets of the American National have been frittered away in an unexplained manner, but, apparently, by inaction and negligence in liquidating. Probably the value of them was less than the face value. But that does not affect the liability of shareholders. If that be true, it shows no more, at most, than that an improvident bargain was made. It does not appear that the Union National contemplated individual liability of shareholders; but if it did, it was a misapprehension of legal rights, the consequence of which can not be unloaded upon the shareholders.

Westal W. Morsman

Counsel for Edgar M. Morsman.

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Term No. 194.
General No. 19655.

In the Supreme Court of the United States.

October Term, 1905.

WILLIAM S. POPPLETON,
Appellant,

vs.

SUMNER WALLACE, ET AL.,
Appellees.

ARGUMENT FOR APPELLANT.

Appeal From The United States Circuit Court of Appeals For the Eighth Circuit.

RICHARD S. HORTON,
For Appellant.

Klopp & Bartlett Co., Printers, Lithographers, Stationers; Omaha.

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ARGUMENT FOR APPELLANT.

Appeal From The United States Circuit Court of Appeals For the Eighth Circuit.

RICHARD S. HORTON,
For Appellant.

The appellant, William S. Poppleton, is the owner of fifty-six and one-fourth shares of capital stock of the American National Bank of Omaha, Nebraska. The decree appealed from affirms the decree of the Circuit Court of the United States for the District of Nebraska, which subjects him to an individual liability under Revised Statutes, section 5151, for alleged debts of the bank.

Prior to the 21st day of December, 1895, the American

National Bank and the Union National Bank of Omaha were each domiciled in the State of Nebraska, doing business in Omaha.

At that date the *Board of Directors* of the American National Bank at a special meeting adopted a resolution authorizing its officers to execute and carry out an agreement which recited the following:

> "*Whereas*, the officers of this bank and the officers of the Union National Bank of Omaha, Nebraska, have negotiated and agreed upon the *sale* by this bank to the Union National Bank, of the business and assets of this bank, on the terms and conditions embodied in the agreement of which the following is a copy, towit:"

(Here follows a copy of the agreement. See Exhibit 7, Record, p. 255).

By the agreement the American National undertook to obligate itself as follows:

(1) To sell and assign to the Union National Bank its business, its cash on hand and cash items, its office furniture and fixtures, and such of its bills receivable as the Union National should accept as cash and without recourse.

(2) To sustain and pay one-half the loss which should be sustained by the Union National by reason of its removal from its then place of business to the offices occupied by the American National on account of the unexpired term of the lease of the premises then occupied by it, and one-half the loss which the Union National should sustain in the sale of its own furniture and fixtures, the value of which was fixed at $3,750.00.

(3) To *guarantee* the Union National against all loss on account of its assumption of the debts of the American National to its depositors and for bills payable, and in the

execution of such guaranty ("and to this end" is the language used) to make and deliver to the Union National its three promisory notes in equal sums, in the aggregate equal to the sum of the liabilities of the American National assumed by the Union National in excess of the cash and other assets accepted as cash by the Union National; such notes to draw interest, to mature in one, two and three years, respectfully, to be non-negotiable, and all to become due on non-payment of any one when due; and "as further security," to sell to the Union National (the words are: "agrees to sell and assign, and does hereby sell and assign") *all* of its remaining assets, bills receivable, stocks, bonds, personal property, real estate, rights and interest therein, or liens thereon, with the understanding and agreement that the Union National Bank should have and hold said assets and property subject to the right of T. L. Kimball, or his successor, to collect and convert the same into cash for the purposes set forth in the contract.

The Union National undertook to bind itself:

(1) To take the furniture and fixtures of the American National at the sum of $3,750.00, and to purchase (the words are "agrees to purchase and does hereby purchase") the business, cash on hand and such bills receivable of the American National as it (the Union National) should be willing to take as cash and without recourse.

(2) To assume all the liabilities of the American National to its depositors and on account of its bills payable.

(3) To liquidate the remainder of the assets of the American National (exclusive of the portion taken as cash) without any charge or expense therefor, except such court charges and attorney's fees as might be found necessary.

The agreement was executed Saturday evening, and on Monday morning the Union National had moved into the offices theretofore occupied by the American National and the depositors balances were transferred from the books of the American National to the books of the Union National, to be paid by the latter as demanded in the course of business. The bills payable indebtedness of the American National was afterwards paid, and the Union National received all the assets of the American National, which included cash and cash items, amounting to the sum of $46,167.79. None of the bills receivable of the American National were at the time taken as cash by the Union National, but it was found (December 23, 1895), that the liabilities assumed by the Union National exceeded the amount of the assets taken as cash, by the sum of $240,929.51, and thereupon, Thomas L. Kimball, as President, and Henry Wyman, as Cashier, executed in the name of the American National, three promissory notes, so-called, for the sum of $67,000.00 each, dated December 23rd, 1895, payable to the Union National, in the terms provided for in the agreement. (Record pp. 252-3). They also gave to the Union National a "Cashier's check" for $39,929.51. The three notes, and the cashier's check, it will be observed, aggregate the sum of $240,929.51, the amount of the indebtedness which the Union National had assumed the payment of, in excess of the assets taken by it as cash.

The Cashier's check for $39,929.51 was soon paid, partially by accepting bills receivable as cash, and the remainder in the course of the liquidation of the assets taken by the Union National for that purpose, which left $201,000 of the sum assumed by the Union National to be gotten out of the remaining assets, and which the American National by the agreement of December 21, 1895, guaranteed

would be realized; that is, it guaranteed the Union National against loss. This sum of $201,000.00 was represented by the three notes for $67,000 each and is the alleged indebtedness of the American National for which it is sought, in this suit, to charge the share-holders individually.

The decree which was entered in this suit by the Circuit Court shows that the assets of the American National have disappeared, and there remains unpaid on the notes $194,466.35. Or to put it in another way, there has been credited on the principal of the notes only $6,533.65, although complainant and the Union National have received *as payments* upon the notes $66,330.40 (see page 5 of Exhibit 33, page 290; and Burness p. 228), and $14,637.86 (see order, p. 225) making a total of $80,968.26. That is, $74,434.61 ($80,968.26 less $6,533.65) has been absorbed by way of interest on the three notes, and this is directly due to the *prolongation* of the liability of the American National by reason of this transaction. Nor does this include the $10,258.50 expended on account of other items of interest (see pp. 291 and 292); nor the $5,827.15 expended on account of taxes from 1895 to 1900—the greater portion of which items were directly traceable to such *prolongation*. (See pp. 292 to 296).

The amount due from appellant, as found by the decree, is $5,469.18, which represents $97.23 for every share of one hundred dollars. From this it will be observed that if the directors had submitted the matter to the Comptroller and he had required the share-holders to make good the entire capital stock, appellant would have had to pay but $2.97 per hundred dollars more than he has been adjudged to pay by the Circuit Court, and the share-holders would have had all the assets of the American National Bank.

ASSIGNMENT OF ERRORS.

1st. The Circuit Court of Appeals erred in its decree in holding it was not essential to the maintenance of the suit in the court below (towit—in said Circuit Court for the District of Nebraska) that the complainant (Sumner Wallace) should have first reduced his demand to judgment.

2nd. The Circuit Court of Appeals erred in its decree affirming the decree and judgment of the Circuit Court for the District of Nebraska; that is to say,—in holding that the suit is one to wind up the affairs of a national bank and a suit arising under the laws of the United States of which the Circuit Court had jurisdiction.

3rd. The Circuit Court of Appeals erred in its interpretation of the contract of December 21st, 1895, between the American National Bank and the Union National Bank and in holding the same to be merely a contract by which "the Union National Bank assumed the payment of the liability of the American National Bank to its depositors and on account of bills payable, and in return was to receive its cash, cash items and such bills receivable as the former was willing to accept at par and without recourse. The difference between the aggregate of the amount received and the gross amount of liabilities assumed was to be represented by three non-negotiable promisory notes of the American National, the payment of which was to be secured by a pledge of all of its remaining assets to Thomas L. Kimball, as Trustee," which erroneous interpretation was material to the final conclusions of the court.

4th. The Circuit Court of Appeals erred in holding that the contract of December 21st, 1895, between the American National Bank and the Union National Bank had been ratified by the share-holders of the American

National Bank; that the individual liability of share-holders under section 5151 of the Revised Statutes of United States might, therefore, be enforced.

5th. The Circuit Court of Appeals erred in holding that complainants, Sumner Wallace and the Union National Bank, could go behind the contract of December 21st, 1895, and that their claims were, in equity for the "contract, debts and engagements" of the American National Bank for which share-holders are made individually liable, under Section 5151 of the Revised Statutes.

6th. The Circuit Court of Appeals erred in holding that said appellant had ratified the contract of December 21st, 1895.

7th. The Circuit Court of Appeals erred in holding that the other stock-holders of the American National Bank could ratify said contract of December 21st, 1895, on behalf of said appellant and in holding that said appellant was bound by the *ultra vires* acts of the directors of the said American National Bank by reason of the alleged conduct of and ratification by a majority of the stock-holders of said American National Bank.

BRIEF.

The errors complained of in the first five assignments of error are exhaustively discussed in the briefs of W. W. Morseman, Esq. and Howard B. Smith, Esq. We will therefore confine ourselves in this brief to the errors complained of in the sixth and seventh specifications.

We will assume that it has been established that the contract entered into between the Union National Bank and the American National Bank on December 21st, 1895,

created no liability which could be enforced against the share-holders of the American National Bank, except upon the application of the doctrine of ratification or estoppel.

The Court of Appeals states in its opinion:

> "It is contended that in making the contract, executing the notes and transferring its assets, the American National Bank transcended its corporate powers and that no debt was thereby created which could be enforced against its share-holders. *Ward vs. Joslin*, 186 U. S. 142." (Record 398).

In *Ward vs. Joslin*, referred to by the court, it was stated: (page 151)

> "If, however, under the state decisions, the corporation would be held estopped from denying the liability, it does not follow that the stock-holders must, therefore, be held liable, if the obligation was in fact incurred without authority. In other words, alleged liabilities incurred without authority, and which do not come within the meaning of the word 'dues' as used in the state constitution, cannot be properly treated as brought within the scope of that word, simply because the corporation may be so situated as to be estopped from denying their validity."

The Court of Appeals further states:

> "We may at the outset omit any consideration of what might be the case were these transactions dependent alone upon the authority of the officers and the board of directors of the bank, for the evidence shows clearly that what was done by them was ratified and confirmed by the shareholders. The contract of December 21, 1895, was executed by Thomas L. Kimball as President of the American National, pursuant to the instruction of a resolution of its Board of Directors. At the annual meeting of shareholders held January 14th, 1896, at which 1665 shares of a total of 2,000 shares of stock were represented, the contract was read and an explanation made by the President of the condition of the bank which led up to and made its execution necessary. This was followed at the same meeting by the adoption of the

resolution by the votes of those representing more than 1,600 shares of stock, instructing the directors to take action looking to the liquidation of the bank." (Record p. 398).

It must be remembered that the appellant had no knowledge of the contract of December 21st, 1895, until after the transfer had been consummated. The proposed liquidation was not to be carried out under the provisions of the statutes governing liquidation. The American National had by the agreement of December 21st, 1895, lost all power to liquidate its assets through its own board of directors and officers. The so-called liquidation was to be simply an incident in the perfection of the sale from the American National to the Union National.

Three weeks prior to the meeting of January 14th, 1896, the American had abandoned its business and turned over its assets to the Union. Prior to January 14th, 1896, no opportunity was given appellant to object or protest in any manner. The first opportunity he had to register his disapproval of the contract entered into between the two banks was at the shareholders' meeting of January 14th, 1896. We quote from the minutes of that meeting: (Record p. 261).

"On motion of Mr. Baird, seconded by Mr. Charlton, the following resolution was adopted, the only vote in the negative being that of Mr. W. S. Poppleton who represented fifty-six and one-fourth shares:

RESOLUTION.

'*Resolved*, that the directors of the American National Bank of Omaha, Nebraska, be and hereby are instructed to take action looking to the liquidation required by law.' "

It will be observed therefore that Mr. Poppleton did not at this meeting do anything to ratify the action of the Directors in disposing of the assets of the American National

Bank, nor did he do anything which could induce the Union National Bank, relying upon his conduct, to change its position to its detriment. It is submitted that he could have done nothing more than he did do to show his disapproval of the action of the directors, and to place himself squarely on record so that the Union National could not be misled as to what his position was in the premises. A motion by him that the action of the directors in making the sale be repudiated would have had no more effect than his refusal to approve the resolution proposing liquidation, which was a part of the consummation of the contract entered into December 21st, 1895.

According to the reasoning of the Appellate Court, a resolution offered by Mr. Poppleton repudiating the action of the directors, if voted down by two-thirds of the stockholders, would have resulted in a ratification by Mr. Poppleton, or would have constituted an estoppel as to him.

We contend that if the action of the directors in disposing of the assets of the American National Bank was *ultra vires*, no act or conduct on the part of any other stockholder can work an estoppel as to Mr. Poppleton, or constitute a ratification by him.

The contract of December 21st, 1895, being out of the ordinary course of banking business, did not result in creating any statutory liability of the stockholders. Any liability that may exist as to any stockholder has been created by his own contract. The record clearly shows that Mr. Poppleton did not agree to any such liability; that he is not estopped from insisting that the stockholders liability is governed by section 5151 of the Revised Statutes and that he has not by word or act ratified the *ultra vires* acts of the directors of the American National Bank.

The appellate court further states in its opinion:

"Pursuant to this resolution, another meeting of the shareholders was held February 25th, sixteen hundred and ninety-six shares being represented, at which a formal resolution for liquidation in accordance with sections 5220 and 5221 of the Revised Statutes was adopted by a vote of those owning sixteen hundred and thirty-nine and three-fourths shares, being some three hundred more than was necessary under the law. In this resolution it was provided that 'Thos. L. Kimball be, and he is hereby appointed the agent and trustee of the shareholders of such b[illegible] to effect such liquidation.' The significance of this appointment is apparent when it is recalled that Kimball was also designated as the agent or liquidating trustee in the contract of December 21st, 1895." (Record 398).

We quote from the minutes of the special stockholders meeting of February 25th, 1896 (pages 264-6 of record.)

"Mr. William Baird moved the adoption of the following resolution:

'*Resolved*, That the American National Bank, of Omaha, Nebraska, be placed in voluntary liquidation, under the provisions of sections 5220 and 5221, U. S. Revised Statutes, to take effect the 25th day of February, 1896, and that Thos. L. Kimball be and hereby is appointed the agent and trustee of the shareholders of said bank to effect such liquidation.'

Mr. A. R. Dufrene seconded the motion of Mr. Baird.

The motion for the adoption of the resolution was put by the chairman to a vote of the stock represented, and the vote was as follows:

Votes represented in (perfor).

For the resolution: * * * * * * *

Votes represented in person. Against the resolution:

Number of Shares	Voted by
56¼	Poppleton, W. S.

Total stock represented and voted as follows:

For resolution, in person	772½	
For resolution, by proxy	867½	
Total for resolution	1,639½	
Against resolution	56½	
Total shares voted	1,696	
Total Capital stock of bank		2,000 shares
Two-thirds necessary to adopt resolution	1,333⅓	shares.

It appearing that more than two-thirds of the Capital stock had voted in favor of the resolution, the chairman declared the resolution adopted.

Thereupon the meeting adjourned.

THOS. L. KIMBALL, Chairman.

Attest:

HENRY F. WYMAN, Secy."

Certainly there was nothing done at this meeting from which a ratification could be inferred, or which could work any estoppel as to Mr. Poppleton. He could have done nothing more than protest and show his disapproval of the proceeding. The business of the American National Bank had been destroyed; its assets were gone; the directors had abdicated their functions; the damage had been done and he was helpless. If by any conceivable court procedure he could have rescinded the sale and could have had declared illegal the action of the directors, what would have been the result? The credit and standing of the American National was gone. It had ceased to exist as a bank. It was too late to follow the provisions of the statute and by an assessment of the shareholders continue the business. Even if re-opened, the American National would have been a bank under suspicion and without depositors. And on the other hand, of what benefit would an attempt to gain possession of the offices of the American have been to the Union National? That bank had vacated its place of business and would doubtless have been confronted with a

"run," and would also have been compelled to wait for the liquidation of the American by the Comptroller before it could have recovered the amount it had expended in carrying out the agreement. The Union National was in possession. Any proceeding by Mr. Poppleton after the deal had been consummated and the Union National Bank had taken possession could not in any manner have benefited that bank. How then can it be contended that by failing to institute some action the position of the Union National has been changed to its detriment, and that Mr. Poppleton is estopped from insisting that there is no statutory liability as to him by reason of the *ultra vires* acts of the directors in disposing of the business of the American National Bank?

The Appellate Court further states:

> "Another shareholders' meeting was held January 12th, 1897, at which 1531 shares were represented and at this meeting there was presented a comparative statement over the signature of Thomas L. Kimball, Trustee, showing the condition of the bank December 21st, 1895, when the contract was made, and on January 1st, 1897. It included an account of transactions during the progress of the liquidation and an expression of views as to the best course to be pursued with reference to the remaining assets. Reference was definitely and explicitly made in this statement to the Union National and to the payment to it of the proceeds of collections which had been made by the trustee. It was ordered to be spread upon the records of the bank." (Record 398).

Mr. Poppleton was not present at this meeting. (Record p. 276). If he had been there, what could he have done to have further disapproved of the contract of December 21st, 1895? No resolution relating to the sale of the business or the liquidation was before the stockholders.

We quote further from the opinion:

"Shortly after the execution of the contract of December 21st, 1895, and before the adoption of the resolution for liquidation, a writing containing an express ratification of the action of the directors in respect of the contract between the two banks was executed by the owners of more than two-thirds of the stock of the American National." (Record 398).

The record shows that Mr. Poppleton did not sign the writing. (Record p. 277).

We quote further from the opinion of the court:

"When it is considered that the Union National was engaged in carrying out its part of the contract, was disbursing its funds and taking up and caring for the contracts, debts and engagements of the American National, the duty of the shareholders of the latter in meeting assembled, to then repudiate the transaction, if they ever desired to do so, was imperative.

Instead of so doing, they supplemented the transaction with the Union National by proceedings in voluntary liquidation, adopted by a vote largely in excess of that required by law, and conducted such liquidation in connection with and as part of the performance of the contract of December 21st, 1895. Every consideration of equity, good conscience and justice leads to the conclusion that the shareholders should be held to have ratified and approved what was done and what was then being done." (Record 399).

Mr. Poppleton did all he could to repudiate the transaction. He had no conrol of the other shareholders. It was their privilege to ratify the transaction, if they so desired. Their acts, however, bound only themselves.

Assuming, for the sake of argument, that a majority of the stockholders could ratify the *ultra vires* acts of the directors of the American National Bank, certainly they could not, by estoppel, create a statutory liability as to Mr. Poppleton. Shareholders as a body are without power to enlarge the statutory liability. A share-holder by becoming a member of a corporation does not consent to the exercise of any such powers. He consents to the individual

liability imposed by the statute, but nothing less than his individual consent can enlarge this liability. If that be given, he is not liable under the statute, but according to the terms of his consent.

It is said in *Ward vs. Joslin*, 186 U. S. pp 142-151:

> "Rights of stock-holders must be considered as well as those of creditors, and they should not be held directly liable unless such liability was within their contract in legal contemplation."

We respectfully submit that there is nothing in the record to show any ratification or approval by Mr. Poppleton of the contract of December 21st, 1895.

Richard S. Horton

Counsel for William S. Poppleton.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905

GEORGE W. McCLELLAN as Executor, etc., et al,
Appellants,
vs.
SUMNER WALLACE, et al,
Appellees.

General No. 19,656.
Term No. 195,

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLANTS.

The Bill, the Amended Bill, the Answer, the Facts, and the Assignments of Error in this appeal are identical with those in the case of Peter Frenzer, te al, vs. Sumner Wallace, et al, Term No. 192, General No. 19,653.

The writer of this brief has assisted in the preparation of the brief in The Frenzer case. For the convenience of the Court, and to avoid a repetition, these Appellants, with the consent of Mr. Howard B. Smith, adopt the brief of Frenzer, et al

as and for their brief, but in so doing make the following changes, to-wit:

Page 8 of the Frenzer brief: On the 14th day of June, 1901, the defendants, Robert McClellan (since revived in the name of George W. McClellan as Executor of the Estate of Robert H. McClellan, deceased, p. 368), R. L. Brownlee, Caroline Carpenter, George Marples and J. H. Hawkins (since revived in the name of George S. Hawkins and John A. Kitchcart as Executors of the Last Will and Testament of J. H. Hawkins, deceased p. 437) filed their joint and several answer to the amended bill of complaint (p. 92.)

Page 12 of the Frenzer brief: The amounts adjudged due complainant and the Union respectively were as follows, to-wit: From George W. McClellan, Executor, etc., $1,163.00, and $3,689.50; from R. L. Brownlee $581.50 and $1,849.25; from Caroline Carpenter $418.69 and $1,331.46; from George Marples $348.90 and $1,109.55; and from J. H. Hawkins $581.50 and $1,849.25.

Thereupon petitions for appeal (p. 373), and Assignments of Error (p. 369), were filed, the appeals were duly allowed by the court (p. 374), bonds were given and duly approved by the court (pp. 375-376), a præcipe for a transcript (p. 378) of the record was served and filed on July 1, 1903, and the record was filed in the Circuit Court of Appeals on July 20, 1903.

The decree of the Circuit Court was affirmed by the Circuit Court of Appeals on December 8, 1904 (pp. 390, 435) and these appellants severally prayed an appeal (p. 438) and assigned errors (p. 440), and their appeals were allowed on February 6, 1905 (p. 444), and the record duly filed in this court on March 13, 1905.

Page 76 of the Frenzer brief: Of these appellants, there

were present at the three meetings above mentioned, by proxy, the following, to-wit: On January 14, 1896, R. L. Brownlee, Caroline Carpenter, John H. Hawkins and George Marples; On February 25, 1896, Caroline Carpenter, R. H. McClellan and George Marples; On January 12, 1897, R. L. Brownlee, Caroline Carpenter, R. H. McClellan, and George Marples.

Page 80 of the Frenzer brief: Of these appellants, only George Marples signed exhibit 25. (Record, p. 237.)

Solicitor and of Counsel for Appellants.

January, 1906.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

HENRY F. WYMAN, ET AL., *Appellants*, vs. SUMMER WALLACE, ET AL., *Appellees*.	Term No. 191. General No. 19652.
PETER FRENZER, ET AL., *Appellants*, vs. SUMNER WALLACE, ET AL., *Appellees*.	Term No. 192. General No. 19653.
EDGAR M. MORSMAN, *Appellant*, vs. SUMNER WALLACE, ET AL., *Appellees*.	Term No. 193. General No. 19654.
WILLIAM S. POPPLETON, *Appellant*, vs. SUMNER WALLACE, ET AL., *Appellee*,	Term No. 194. General No. 19655.
GEORGE W. MCCLELLAN, as Executor etc., et al., *Appellants*, vs. SUMNER WALLACE, ET AL., *Appellees*.	Term No. 195. General No. 19656.

And Other Appeals From the Same Decree.

Appeals from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT OF APPELLEES.

JAMES M. WOOLWORTH,
R. S. HALL,
For Appellees.

I

STATEMENT.

The facts in this case, as disclosed by the amended bill and the evidence, are that the American National Bank and the Union National Bank were, on and prior to the 21st day of December, 1895, each engaged in business in the City of Omaha, Nebraska.

That during the month of December the American National Bank was in such financial condition that it became necessary for it to provide in some manner for the payment of a large amount of deposits on or about January 1st, 1896, and that it did not have on hand sufficient funds with which to meet the demands which it knew would be made upon it at that time, and which if not paid would precipitate a demand by all of its depositors and thus bring on a failure of the bank with all the disastrous consequences which inevitably follow such failures.

This being the condition of the American National Bank, the officers of the Bank and leading stockholders entered into negotiations with the Union National Bank, with a view to affording relief to the American, whereby its immediate obligations should be paid ,its depositors fully protected and paid and an opportunity given to realize upon its assets.

That as a result of such negotiations, a contract was entered into between the two banks by and through the Board of Directors of each.

(See minutes of meeting of Board of Directors of American National, Exhibit 7, p. 255, Record.)

The agreement thus authorized by the Board of Directors is as follows:

AGREEMENT.

"This indenture witnesseth: That the American National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the first part, has and by these presents does hereby agree, for the considerations hereinafter expressed, to and with Union National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the second part, as follows, to-wit:

"First. The party of the first part hereby agrees to sell and assign and does hereby sell and assign to the second party the business of the party of the first part, its cash on hand, office furniture and fixtures and such of its bills receivable, as the party of the second part on examination may be willing to take as cash without recourse on the party of the first part.

"Second. The party of the second part hereby agrees to purchase and does purchase from the party of the first part the business of the party of the first part, cash on hand, office furniture and fixtures, and such bills receivable as the party of the second part may be willing to take as cash on examination of the same without recourse on the party of the first part and to pay the party of the first part for said office furniture and fixtures the sum of Three thousand seven hundred and fifty dollars ($3,750.00), and to assume the liabilities of the party of the first part to its depositors and on account of its bills payable and to liquidate the remaining assets of the party of the first part which may not be taken and received as cash by the party of the second part without charge or expense to the party of the first part, except such court charges and attorneys fees as may be found necessary and that such liquidation shall be conducted under the direction of Thomas L. Kimball, or such other person as may be agreed upon on behalf of the stockholders of the party of the first

part, **it be ing understood and agreed that said Kimball, or his successor, shall represent in said liquidation the stockholders of the party of the first part, and shall receive, hold and use the proceeds of the assets of the party of the first part as trustee of the parties hereto for the mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary court charges and attorney' fees attending said liquidation shall be incurred under the direction of said Kimball, or his successor.** (Black type ours.)

"Third. In consideration of the above agreement of the party of the second part, the party of the first part hereby agrees to sustain and pay one-half of the loss and expense which the party of the second part may sustain on account of removal from its present quarters by reason of its unexpired lease on its present place of business, and one half of the loss which the party of the second part may sustain on the sale of its office furniture and fixtures, which furniture and fixtures are agreed upon at the present price and value of three thousand seven hundred and fifty ($3,750.00) dollars, and the party of the first part further agrees and does hereby guarantee the party of the second part against any and all loss on account of assuming the liabilities of the party of the first part as aforesaid. And to this end the party of the first part agrees to execute and deliver to the party of the second part its three promissory notes of equal sums for the amount of liabilities which the party of the second part may assume after crediting the full amount of cash on hand and bills receivable and other assets which may be accepted by the party of the second part on examination, which notes shall draw interest from date at the rate of six

per cent. per annum, payable quarter annually, and be payable in one, two and three years from date respectively, and shall be non-negotiable. And in case of non-payment of any of said notes when due the whole of said principle sums of all of said notes and accrued interest shall thereupon become due.

"And as further security to the party of the second part, the party of the first part agrees to sell and assign and does hereby sell and assign to the party of the second part all of its assets which may remain after the selection therefrom by the party of the second part heretofore mentioned, including all its bills receivable, stocks, bonds, personal property of every kind, and all real estate and interests therein or liens thereon, **with the understanding and agreement that the party of the second part shall have and hold said assets and properties subject to the right of said Thomas L. Kimball, or his successor, to collect and convert the same into cash for the purposes hereinbefore expressed.** (Black type ours.)

"And it is further agreed that the party of the first part may pay and have credited on said notes at any time prior to maturity any sums of money of five hundred ($500.00) dollars and upward, provided the sums so paid shall be in even hundreds.

"Witness the names and corporate seals of the parties hereto this 21st day of December, A. D., 1895.

"Now, therefore, resolved that the foregoing agreement be and the same is hereby ratified and confirmed and that the officers of the bank be and are hereby authorized and directed to execute said agreement and carry the same into effect for and on behalf of this bank, and that the officers of this bank be and are hereby authorized to execute and deliver to the Union National Bank the notes of this bank in the sums which may be

required to comply with the terms of the foregoing agreement."

The Union National Bank received from the American National Bank certain cash and cash assets, and certain discounted notes which it received as cash and assumed and agreed to pay, and did pay the deposits and bills payable and other indebtedness of the American to the amount in round numbers of $240,000.00, and the amount of cash and cash assets received by it, being in round numbers the sum of $39,000.00. The American, according to the agreement, gave its three promissory, non-negotiable notes for the sum of $67,000.00 each, payable in one, two and three years. The remaining assets of the American stock the Union took as security for this $201,000.00. The Union National paid all of said $289,000.00 of liabilities.

(See Wyman's testimony, page 169.)

The language of the contract as to said assets being taken as security is as follows: "And as further security to the party of the second part, the party of the first part agrees to sell and assign and does hereby sell and assign to the party of the second part all of its assets which may remain after the selection thereof by the party of the second part heretofore mentioned, including all its bills payable, stock, bonds, personal property of every kind, and all real estate and rights and interest therein or liens thereon, with the *understanding and agreement that the party of the second part shall have and hold said assets and properties subject to the right of said Thomas L. Kimball or his successors to collect and convert the same into cash for the use and purposes heretofore expressed.*"

Thomas L. Kimball mentioned in the agreement as Trustee was the president of the American National.

This agreement was signed on the 21st day of December,

1895, and on January 14th, 1896, the stockholders of the American National held their annual meeting.

At this meeting the action of the Board of Directors in making this contract was taken up and discussed.

(See Exhibit 9, being minutes of stockholder's meeting, pp. 256, 260, 261, Record.)

The capital stock of the American was $200,000, divided into 2,000 shares of $100 each.

The total representation at the meeting was 1665¾ shares out of a possible 2,000 shares.

In the record we find the following (page 260):

"Gen. Manderson said that he hoped before any other business was brought before the meeting there would be made to the stockholders a statement of the circumstances which led up to the agreement with the Union National Bank.

"The agreement entered into between the directors of the American and Union National Banks was read.

"Mr. Kimball made a statement of the conditiions that confronted the American in December, 1895, and the *necessity* for taking advantage of the opportunity that was offered whereby the depositors of the Bank would be *protected,* the immediate obligations of the bank *paid* and time given the bank to realize on its assets."

The record then recites the names of a large number of stockholders expressing satisfaction at the action of the directors, and that they had acted for the best interests of the stockholders.

(Record, page 260.)

At the same meeting the following resolution was adopted by a vote of 1609½ for out of 1665¾ represented, and being more than three-fourths of the total stock.

The resolution is as follows:

> "Resolved, that the directors of the American National Bank of Omaha, Nebraska, be and hereby are instructed to take action looking to the liquidation required by law.

(See page 261.)

Afterward, on January 17th, 1896, the Directors held a meeting at which the following resolution was unanimously adopted, to-wit:

> "Resolved, that a meeting of the shareholders of the American National Bank of Omaha, Nebraska, be called for the 25th day of February, 1896, for the purpose of considering and voting upon the following resolution, to-wit:
>
> "Resolved, That the American National Bank of Omaha, Nebraska, be placed in voluntary liquidation under the provisions of Sections 5220 and 5221, U. S. Revised Statutes, to take effect the 25th day of February, 1896, and that Thos. L. Kimball be and he hereby is appointed the agent of the shareholders of said bank to effect such liquidation."

(See Record, pp. 261-262.)

Each stockholder was then notified of such meeting, the notice being given on January 20th, 1896.

(See Record, p. 262-263.)

The stockholders then came together on February 25th, 1896, in pursuance of said call and notice, with 1696 out of the full 2000 shares represented, and 1639¾ shares voted for the following resolution:

> "Resolved, That the American National Bank of Omaha, Nebraska, be placed in voluntary liquidation under the provisions of Sections 5220 and 5221, U. S.

Revised Statutes, to take effect the 25th day of February, 1896, and that Thos. L. Kimball be and hereby is appointed the agent and trustee of the shareholders to affect such liquidation."

(See Exhibits 14 and 15 Record, pp. 264-5-6.)

The necessary steps were then taken to comply with the requirements of the Comptroller of the Currency and the notices required by law were published.

(See record, pp. 267-8-9-270.)

Mr. Kimball, thus being the trustee under the agreement and the agent and trustee for the stockholders, together with Henry F. Wyman, cashier of the American, proceeded to handle and collect the assets held as security for the debts of the bank, and on January 12, 1897, being at the end of the first year, made their annual report to the stockholders, which report is Exhibit 24.

(See Exhibit 24, p. 274, record.)

Mr. Wyman, upon being questioned with reference to this report, testified as follows:

"Q. Calling your attention to this record which has just been offered in evidence, Exhibit 24, and particularly to the report embodied in it * * * you may state what that report is, it is a comparative statement between what dates?'

"A. It is a comparative statement of the bank between December 21st, 1895, and January 1st, 1897.

Q. Calling your attention to the item in that report under the heading of December 21st, 1895, and of deposits $239,947.67, you may state what had become of those deposits, they not appearing in your opposite side of January 1st, 1897?

A. They had apparently been paid.

Q. Well, are you able to state in what way they

were paid, are those the deposits that were assumed by the Union National Bank?

A. Yes, sir.

Q. So, when you say they were paid, you mean they were paid by the consummation of the contract which has been referred to?

A. Yes, sir.

Q. Calling your attention to the bills payable, $50,000, under date of December 21st, 1895, and to the bills payable of $184,000, under date of January 1st, 1897, you may state how that difference was made up, if you know?

A. The $184,000 represented the notes given by The American National Bank to the Union National Bank, the $50,000 under date of December 21st, 1895, having been disposed of, paid.

Q. And by whom was that paid?

A. By the Union National Bank.

Q. Now, when you say the $184,000 represents the notes, given, do you refer to these three notes, Exhibits '2,' '3' and '4'?

A. Yes, I refer to that amount which was at that time unpaid on those notes.

(See Wyman's testimony, pp. 169-170.)

The same witness testified as to the giving of the three notes aggregating $201,000, as follows:

Q. Well, you misunderstood my question, I think. What method was pursued which resulted in the giving of these three notes, Exhibits '2,' '3' and '4'?

A. I do not believe I know just what you are getting at.

Q. How did you arrive at these amounts?

A. We aggregated the indebtedness of the American National Bank and deducted from that the amount

of cash and notes that the Union National Bank took into its—the amount of cash it took into its cash and the amount of notes it took into its bills receivable, the notes it assumed as a part of its own notes.

Q. When you say any notes it assumed as part of its own notes, do you mean notes that were then held by the American National Bank and which the Union National Bank was willing to take at their face?

A. Yes, sir.

Q. So they took certain notes of the American just the same as they took cash?

A. Yes, sir.

Q. And then the $201,000 was arrived at by taking the difference between the amount of cash and cash securities which the Union National Bank took and the liabilities which it assumed, is that right?

A. That is right."

This action was commenced in August, 1898, and brought by Sumner Wallace, assignee of one of the notes, on behalf of himself and all other creditors of the American National Bank under authority of Sec. 2, of the Act of Congress, approved June 30, 1876, providing for the enforcement of the individual liability of shareholders of a National Bank which has gone into voluntary liquidation under the provisions of R. S. Sec. 5220.

It was alleged in the Amended Bill that Wallace was the owner of one of the three promissory notes of $67,000 each, which made up the $201,000, and that the Union National was the owner of the other two notes. The contract was set out in the Amended Bill, and the Union National was made a defendant, as was also the American National and Kimball the trustee.

It will be seen by the allegations of the Bill and the evi-

dence in the record that the indebtedness of the American was paid by the Union under the contract, and that in reality the only debt of the American remaining was the indebtedness created by such payment and owing to Wallace the complainant and to the Union National Bank, and that in order to make a fair and equitable assessment against the stockholders the assets should be sold in order that they might get the benefit of whatever of value remained.

In addition to the allegation in the Amended Bill that the Union National was the owner and holder of the other two notes, the Union National in its answer filed to the Amended Bill set out its claim and asked that the relief prayed for in the Amended Bill be for its benefit as well as one of the creditors in whose behalf the action was brought.

Before referring to the points argued in the briefs of counsel, we wish now to summarize what the undisputed evidence shows as gathered from the record and the admitted facts in this case. The appellants seem to depend upon their ability to reverse this case upon legal propositions, and in discussing them do not seem to take into account the facts. They are, as we think, absolutely undisputed, and are as follows:

1. The Union National under this contract assumed to pay and did pay liabilities of the American National to the extent of $201,000 over and above what it got from the American under the contract.

2. All of the depositor's accounts and all of the bills payable of the American were thus provided for and paid.

(See record, pp. 169-170.)

3. This excess was at the time of the transaction definitely ascertained and fixed and acknowledged by the American National by giving to the Union National its three promissory notes, each for the sum of $67,000.

4. This indebtedness thus acknowledged at that time

was contracted under the direction and control and by resolution of the governing body of the American National, its Board of Directors, and the agreement authorized to be signed by its officers embodied in the minutes of the meeting.

(Record, pp. 255-6-7.)

5. At a meeting of practically all of the stockholders within about three weeks thereafter the whole situation was laid before them and fully explained.

(Record, pp. 258-9-60.)

6. After such explanation the stockholders recognized the action of the Directors as being for the best interests of the Bank and acted under the contract, and instructed the Directors to take action looking to the liquidation of the Bank's affairs.

(Record, p. 261.)

7. The stockholders, at a subsequent meeting in February of the same year, voted practically unanimously to go into voluntary liquidation and appointed the President, Thomas L. Kimball, the agent and Trustee of the shareholders, the same party who was Trustee under the contract.

(Record, p. 264.)

8. That the next year, 1897, at the annual meeting of the stockholders, a report was made by the Cashier, Henry F. Wyman, attested by the Trustee and agent, Kimball, showing the condition of the Bank's affairs which fully recited what was being done under the contract and in liquidating the affairs of the bank; this report showing that all the bank's indebtedness had been fully cared for by the Union National, and that the bank owed the Union National upon the notes $184,000 at that time, and that all the Bank's other indebtedness had been paid by the Union National. This report was approved by the unanimous action of the stockholders.

(Record, p. 274, Ex. 24, and testimony of Wyman, pp. 169-70.)

ARGUMENT:

The First Point Argued in the Brief of Counsel Morsman is the General Proposition that the Circuit Court Had no Jurisdiction.

1. Because there is no diverse citizenship.

2. Because Section 2 of the Act of June 30, 1876, is repealed by Section 6 of Act of August 13, 1888.

Because the proceedings of the American National were a mere form.

3. Because the suit could only be brought by the United States and that the American National Bank was a necessary party.

We do not claim in this case that the Court has jurisdiction because Wallace, who brought this suit on behalf of himself and all other creditors, is a citizen of New Hampshire, but that the Court has jurisdiction by reason of the law relating to the liability of stockholders of Banks in voluntary liquidation.

While it is true that we are seeking to enforce an obligation of the American National Bank, we are enforcing it against the stockholders of that Bank. We do not need to be a *judgment* creditor of the Bank before bringing such action, but we bring it under Section 2, of the Act of June 30, 1876, which is as follows:

> "That when any national banking association shall have gone into voluntary liquidation under the provisions of Section five thousand two hundred and twenty of said Statutes, the individual liability of the shareholders provided for by Section fifty-one hundred and fifty-one of said Statutes may be enforced by any creditor of said association by bill in equity in the nature

> of a creditor's bill brought by such creditor on behalf of himself and of all other creditors of the association against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

Act of June 30, 1876, 19 Stat., 63.
U. S. Comp. Stat. 1901, p. 3509.

This is a law granting the right of a creditor to sue the stockholders of a National Bank that has gone into voluntary liquidation. There is nothing in this Act about suing the Bank itself, and yet counsel claims that the Act of 1882 repealed this Section of the Act of 1876.

The law of 1882 simply made the jurisdiction as to National Banks the same as to other banks not organized under the laws of the United States. It did not refer to stockholders liability nor to the rights of creditors as against the stockholders. The jurisdiction of the Circuit Court in suits brought by creditors to enforce stockholders' liability at the time of the passage of the law of 1882, depended upon Section 2, of the Act of 1876, but the jurisdiction as to the bank itself did not depend upon that section, but upon Section 57, of the Act of June 3, 1864, 13 Stat. 116, which gave the Circuit Court jurisdiction of "all suits by or against any banking association established in the District where the Court is held under any law providing for National Banking Associations."

So that when the Act of 1882 was passed, it took away this general jurisdiction over National Banks, but it did not pretend to effect Section 2, of the Act of 1876, which gave a right of action by a creditor of a National Bank in liquidation on behalf of himself and all other creditors against the shareholders of such bank.

Counsel in his argument assumes that Section 2, of the

Act of 1876, refers to the jurisdiction of the Courts as to the bank, whereas it simply refers to and grants a right of action to a creditor against the shareholders of banks in liquidation, and this right does not depend upon citizenship, but must be brought in the Circuit Court having original jurisdiction in equity where the Bank was located. This act has never been repealed either expressly or by implication.

There is nothing in the Act of 1876 which requires the Bank to be made a party to an action brought under its provisions against the shareholders, but it is probably a necessary party.

The Act of 1876 giving a right of action by creditors against stockholders regardless of citizenship, let us see what the law was as to jurisdiction of the *bank* at the time this action was brought. The law of 1888 was in force at that time, which was as follows:

> "Sec. 4. That all national banking associations established under the laws of the United States shall, for the purpose of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the state in which they are, respectively, located.
>
> "And in such cases, the Circuit and District Courts shall not have jurisdiction, other than such as they would have in cases *between individual citizens of the same state.*
>
> "The provisions of this Section shall not be held to affect the jurisdiction of the Courts of the United States in cases commenced by the United States or directors or any officers thereof, or cases for winding up the affairs of any such bank."

So that this very Act, in force when this action was begun, reserves to the Court, jurisdiction over National Banks

when they would have jurisdiction between citizens of the same state.

The Court, then, having jurisdiction between creditors and stockholders being citizens of the same state, with regard to the stockholders' liability would have jurisdiction over the bank if necessary or desirable to make it a party. But also, under the circumstances of this case, so far as the Bank is concerned, it would come under the other exception that it was a winding up of the affairs.

The Court, therefore, having jurisdiction between citizens of the same state, with reference to a bank in voluntary liquidation clearly has jurisdiction over the bank and the case, so far as the bank is concerned, comes within both of the exceptions found in Section 4, of the Act of 1888.

Counsel admits that in *King vs. Pomeroy*, 121 Fed. 287, and in *Williamson vs. American Bank*, 115 Fed. 793, the jurisdiction of the Circuit Court in such cases was recognized, but undertakes to argue that this question was not before the Court.

The opinion in *King vs. Pomeroy* was written by Justice Sanborn, and approves the decision in *Williamson vs. American Bank*, 115 Fed., in so far as it held that the Court would have jurisdiction under the Act of 1876, but unlike the Williamson case, held that it was not exclusive.

He says on page 295, 121 Fed.:

> "In *Williamson vs. American Bank*, 115 Feb. 793, 52 C. C. A., 1 the assignee of a national bank located at Ashville, in the State of North Carolina, which was in voluntary liquidation, and a creditor of that bank, exhibited a bill in equity to the judges of the Circuit Court of the District of South Carolina on behaf of himself and all other creditors against a single share-

holder of the insolvent bank and his trustee to enforce the shareholder's liability, and the Court sustained a demurrer to the bill. It is plain that the demurrer was properly sustained, because the insolvent bank was a necessary party in the first instance to any suit to enforce the liability of its shareholders, and it was not made a party to that proceeding. The ascertainment of the debts and liabilities of the bank and the judicial determination of the necessity and the requisite extent of the enforcement of the stockholders' liability, are essential prerequisites to the collection of the amounts owing by them and the insolvent bank is a necessary party to these adjudications."

This Court, therefore, had directly before it the question in that case of the construction to be given to the Act of 1876, because it had been decided in Circuit Court of Appeals, Fourth Circuit, that the Act of 1876 was *exclusive* as to enforcement of shareholders' liability, while this Court held it a cumulative remedy and did not prevent enforcement being made by a receiver.

The fourth paragraph of the syllabus in the *King vs. Pomeroy* case is:

> "The remedy of a creditor's bill to enforce the liability of shareholders of national banks in voluntary liquidation provided by Section 2 of the Act of June 30, 1876, c. 156, 19 Stat. 63, (U. S. Comp. Stat., 1901, p. 3509), is cumulative and not exclusive."

In the opinion in this same case Justice Sanborn, in speaking of the effect of the Act of 1876, says, (p. 292):

> "It simply extends to every creditor a remedy which creditors *other* than that of the location of the *bank* had before it was enacted."

King vs. Pomeroy, 121 U. S., 287.

The syllabus in the Williamson case is as follows:

> "When a national bank goes into voluntary liquidation the only authorized procedure for the enforcement of the individual liability of its stockholders is that prescribed by Act June 30, 1876 (19 St. 63), by a suit in equity in the nature of a creditor's suit brought on behalf of all creditors in a Court for the district in which the bank is located, in which the necessity and extent of the ratable enforcement of the stockholders' liability shall be determined. Such suit should be against the bank, and all of its stockholders, and in case ancillary proceedings should be necessary for the collection from non-resident stockholders of their ratable proportion of the amount necessary to pay creditors, such suits should be authorized by the Court of original jurisdiction and brought by a receiver or other person appointed by such Court."
>
> *Williamson vs. American Bank, et al.*, 115 Fed., 793.

But, aside from the foregoing considerations, the Circuit Court would have jurisdiction because this is a statutory action arising under the laws of the United States, and for that reason alone the court had jurisdiction.

Counsel invokes the rule that it is *necessary* to ascertain the indebtedness of the bank, its creditors, etc.

In another portion of his brief he argues that the contract of the American was *ultra vires.*

He also argues that the American National did not go into voluntary liquidation.

He also argues that this is not such a "contract debt or engagement of the bank" as is contemplated in stockholders' liability mentioned in Sec. 5151.

So that the various sections of the Banking Law are involved in this action. The bill itself is based upon a liability growing out of the banking laws of the United States. It shows upon its face that the questions in the case grow out

of federal laws. It comes directly within the first sub-division of Section 629, Rev. Stat., which says that: "The Circuit Court of the United States shall have original cognizance concurrent with the courts of the several states of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States," etc.

This action depends absolutely upon a law of the United States. It is based upon the liability fixed by Section 5151, whereby a stockholder is made liable for the "contracts, debts and engagements of the bank," and upon Section 2 of the Act of 1876, which authorized a creditor to bring a suit on behalf of himself and all other creditors of a bank in voluntary liquidation. The rights of the creditors depend upon the meaning of these various sections of the Banking Law.

A suit arises under the constitution and laws of the United States whenever its correct decision depends upon the construction of either.

Cohens vs. Virginia, 6 Wheat., 262.

> "A case arises under that constitution not merely when a party comes into Court to demand something conferred upon him by the constitution, a law of the United States or a treaty, but whenever its correct decision as to the right, privilege, claim, protection or defense of a party in whole or in part depends upon the construction of either."

Tennessee vs. Davis, 100 U. S., p. 258 (6 Par. of syllabus.)

> "When it appears in a suit that some title, right, privilege or immunity on which recovery depends, will be defeated by one construction of the constitution or laws of the United States or sustained by the oppo-

site construction, the case is one arising under the constitution or laws of the United States, within the meaning of that term as used in the Act of March 3rd, 1875, 18 Stat., 470."

Starin vs. New York, 115 U. S., 249.

In the case of *Southern Pacific R. R. Co. vs. California*, 118 U. S., the court, by Chief Justice Waite, on page 112, says:

"In *Railroad Company vs. Mississippi*, 102 U. S., 135-141, it was decided that a suit brought by a state in one of its own Courts against a corporation of its own creation can be removed to the Circuit Court of the United States under the Act of March 3, 1875, if it is a suit arising under the constitution or laws of the United States, although it may involve questions other than those which depend on the constitution and laws.

"The case of *Arms vs. Kansas*, 111 U. S., 449, is to the same effect, and in *Starin vs. New York*, 115 U. S., 248-257, it was stated as the effect of all the authorities on the subject, that if from the *questions involved in the suit* 'it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States within the meaning of that term, as used in the Act of 1875; otherwise not."

Southern Pacific R. R. Co. vs. California, 118 U. S., 112.

In *Union National Bank vs. Miller, Treas*, 15 Fed., the syllabus of the case is as follows:

"(1) The Act of July 12, 1882, to enable national banks to extend their corporate existence, placed na-

tional banks and other banks as to their right to sue in the Federal Courts upon the same footing, and consequently national banks cannot, in virtue of a mere corporate right, sue in other Courts.

"(2) But national banks may, like other banks and citizens, sue in such Courts whenever the subject matter involves some element of Federal jurisdiction. Thus, a suit by a national bank against a county treasurer to enjoin the collection of an excessive tax upon its personal property alleged to have been made in violation of the Act of Congress permitting the state to tax national banks, presents a case arising under a law of Congress, and is, therefore, maintainable in a Federal Court."

Union National Bank vs. Miller, Treas., 15 Fed., 703.

It is apparent, going back now to the Act of 1882, that even under that act a state bank, if it were a creditor of a national bank in voluntary liquidation, could sue under the act of 1876 in the Federal Court, and if, as this court has already decided in the Pomeroy case, the national bank is a necessary party to such an action, can it be doubted that the court in such an action would have jurisdiction of the national bank?

The language of the Act of 1882 is that the jurisdiction "shall be the same as and not other than the jurisdiction for suits by or against a bank not organized under the laws of the United States." (22 Stat., 162.)

Before the passage of this act the Court had jurisdiction of all suits against national banks. Before the passage of this act the law of 1876 is conceded by counsel to have been in full force and effect.

If a state bank, after the passage of this act, had a claim against a national bank in voluntary liquidation, although it

were a citizen of the same state, it could bring an action under the 1876 act against the stockholders, and if it could, the Court having jurisdiction to allow *it* to bring such a suit, it could join the National Bank as a party if, as counsel claims, it is necessary that it be a party.

In other words, the law of 1876 would allow a state bank to sue in the Federal Court, though a citizen of the same state as the stockholders sued, and as the 1882 act reserved jurisdiction of national Banks in cases where it would have jurisdiction of State Banks, the bank could be sued in that kind of a case.

So that if we look at this question of jurisdiction from the point of the 1882 law, the 1888 law, or from the view that the whole suit is founded upon Federal statutes and involve their interpretation and meaning, the Court had jurisdiction.

The Bank is not in this Court complaining about lack of jurisdiction. It did not appeal, and the argument of counsel that the Act of 1876 is repealed by implication by the Act of 1882 is, we are convinced, an argument that cannot for a moment be sustained.

II

Counsel claims that the statutory liability of shareholders cannot be extended to any obligation arising out of the agreement of December 21, 1895, or to anything done pursuant to it.

This contract is clear enough in its terms, and taken in connection with the testimony shows that the American National, at the time of its execution, was in an embarrassed condition, that it was under necessity to make provision for caring for its depositors, and that the Directors were well aware of the entire situation and the straits to which the bank

was put. While it is true the negotiations were commenced by the officers of the bank, those representing the largest holdings, the making of the contract was done by order of the Board of Directors, the governing body of the Bank.

Mr. Morsman, in his statement, says (p. 2, brief): "At that date the American National was embarrassed." Knowing the situation of the Bank, the Board of Directors direccted the making of the contract December 25, 1895.

(P. 255 Record, Exhibit 7.)

A few days thereafter the annual stockholders' meeting was held (June 14th, 1896), with 1665¾ shares of stock represented out of 2000 shares, the full stock of the bank.

At that meeting the President of the American National, after the agreement which had been entered into by the Directors of the American National had been read in full, made the following statement:

> "Mr. Kimball made a statement of the conditions that confronted the American in December, 1895, and the necessity for promptly taking of the opportunity that offered, whereby the depositors of the bank would be protected, the immediate obligations of the bank paid and time given the bank to realize on its assets."

(Ex. 9, p. 260.)

After hearing this statement from the President the stockholders at the same meeting passed the following resolution:

> "Resolved, That the Directors of the American National Bank of Omaha, Nebraska, be and hereby are instructed to take action looking to the liquidation required by law."

(Exhibit 9, p. 261.)

Afterward all the necessary preliminary steps were taken to put the affairs of the Bank into voluntary liquidation.

(See Directors' meeting, Ex. 10, p. 261-2.)

(Notice sent to stockholders, Ex. 11, p. 262.)

(Stockholders' meeting, Ex., 14, p. 265.)

At the stockholders' meeting, 1695 votes out of a possible 2000 voted to go into voluntary liquidation.

(Copy of Teller's report at stockholders' meeting, Ex. 15, p. 267.)

(Certificate of Cashier to Comptroller, Ex. 16, p. 267.)

(Approval of Comptroller to liquidation, Ex. 18, 269.)

(Proofs of Publication required by law, Exs. 18-19-22.)

But it is not worth while to call further attention to the action taken by the Bank in going into voluntary liquidation.

It is conceded by Counsel that the necessary steps to put the Bank into voluntary liquidation were taken.

Counsel in the Morsman case (No. 193) says, (p. 23 brief): "The evidence shows it is true that the association went through the *form* of exercising the power conferred by that section, (Section 5220) and taking the steps required by Section 5221; but it was all a sham and pretense."

The word "liquidation" used in Section 2, and in Section 5220, Rev. Stats., "has a definite meaning and presupposes the existence of assets to be liquidated in the manner provided."

It is strange that Counsel should argue that, when the American National went through all the proper forms to voluntarily liquidate the affairs of the Bank, and proceeded thereunder through an agent appointed, that there was nothing to liquidate. They recognized this contract at the very meeting that they voted to instruct the Directors to take the necessary steps to place the bank in voluntary liquidation.

It was read in full and explained and the necessity for making it shown. There were large assets (face value) to

be looked after, which, of course, they hoped would yield much more than enough to pay the notes given to the Union. They amounted (face value) at the time the contract was made, and thus about the time of taking these steps to go into voluntary liquidation, to over $450,000.

They were being handled by and under the direction of Mr. Kimball, the president of the American, Trustee under the agreement, and, by the vote of liquidation, *agent* for the stockholders. So that there was not merely an empty form to go through with, there were assets to look after in the interests of the stockholders.

There is no method pointed out in the National Banking Act as to what a bank shall or may do when about to go into voluntary liquidation.

Section 5220, Rev. Stat., simply says:

> "Any association may go into voluntary liquidation and be closed by a vote of its shareholders owning two-thirds of its stock."

Then follows in subsequent sections what notices must be given, but there is not a word as to how the association is to provide for its indebtedness.

Whatever the association does evidently would be satisfactory to the defendant so long as creditors were provided for, and if these stockholders were satisfied with the provisions made under this contract for payment of the debts of the bank and took the necessary steps to put the bank into voluntary liquidation, and the banking department was satisfied and approved of the liquidation (See Comptroller's letter, Ex. 18, p. 269), surely the stockholders who took the steps cannot be heard to say that they did not go into liquidation.

The foregoing argument shows conclusively jurisdiction to maintain this suit because a law of Congress is to be con-

strued, and second, because the Statute expressly gives the Circuit Court within the District where the Bank is located the jurisdiction, and such being the clear wording of the Statute we cannot conceive how the holding of this Court can be otherwise, so that the thought naturally follows that the specific lien creditor can surely maintain the suit. The Contract gives a lien to the Union National Bank and to the assignee Sumner Wallace by the transfer of the note to him, therefore, by the conceded rule that a special lien gives a right to proceed without judgment, the Court has jurisdiction. The decisions of the United States Supreme Court established the rules that a secured creditor must hold his advantage in having collateral security, and must be paid dividends without regard to his having collateral security subject only to the fact that a full payment exhausts the secured creditors' rights.

Merrill vs. National Bank of Jacksonville, 173 U. S., 131.

The proceeding in this case recognizes the lien upon the assets and the suit asks the sale of the assets and decree for any balance. The fact that the suit is for the benefit of all creditors can make no difference in the vested interest of Wallace and Union National Bank in the assets. No other creditors appearing, there is no question of priority of lien to determine. Not only is the suit founded upon a law of Congress, but the Statute expressly states that any creditor may bring the suit, so it appears to us a useless presumption to contend that the Circuit Court of the United States has no jurisdiction in this case, or that judgment and execution are at all essential to the maintenance of the suit. In *Terry vs. Little*, 11 Otto, 216, the Supreme Court had the question before them on the liability under a State law similar to the legislation creating the liability of stockholders of National Banks, and

Waite, C. J., says: "Each stockholder is bound for his own share and no more. No judgment can be rendered against him for what another should pay. It follows that in an action at law each stockholder must be sued separately. In equity it is different, for there the decree can be worked to suit the exigencies of the case; and each stockholder can be held liable and proceeded against for what he is bound to pay, and no more."

Kennedy vs. Gibson et al., 3 Wall., 498-505.

This seems to us to conclusively dispose of the objection, to the jurisdiction of the Court and to the right of Wallace to bring the suit, he being the creditor and also a creditor having a contract lien, which by the holdings of the Supreme Court is a vested right. To assert that the lien created by the contract in this case cannot be enforced without first suing at law and obtaining judgment, is absurd.

It is true that the contract in this case uses the word "sell," but a reading of the contract will show that nothing was sold except a little furniture. The sum and substance of the contract was for the purpose to enable the American National Bank to borrow money to pay its debts, to pay its depositors and Banks of which the American had borrowed large sums. We cannot let the unfair statements of counsel go unchallenged. We presume that the parties who acted for the two banks were confident that the assets would ultimately pay the sums necessary to save the American National Bank. The wretched worthlessness of the assets of the American was as much a surprise to the Union National Bank as to the defendants in this case. The fact that Mr. Kimball and Mr. Wyman took charge of the collections of the assets of the American indicates the certain caution and care exercised by the American directors. These men were officials and stockholders of the American, fully familiar with all the assets and

had full chance to collect every dollar possible to be collected from the assets. The subsequent facts disclosed show conclusively that the American was in absolute need of this help to pay its depositors and that it would have been simply impossible for the American to have continued with open doors. Counsel complains of the long lapse of time during which that obligation has drawn interest. We respectfully call the Court's attention to the fact that the lapse of time complained of was greatly caused by the defendants prolonging the litigation. A suit with fifty or more defendants drags extremely slow. At the time the American needed to borrow this money it was vital to its interest that this money be furnished it.

We do not question the rule that a National Bank must find its authority in the Statute and that it possesses such power only as the Statute gives either expressly or as incidental to carry out the purposes of its creators. But what are its purposes and objects ? The learned counsel for appellants—Wyman et al., cites *Roberts vs. Hill*, 24 Fed., 571, to show that a National Bank is in contemplation of insolvency when the concern will presently be unable to meet its obligations and will be obliged to suspend its ordinary operations, and thus it was the duty of the directors of the American to have called the attention of the Comptroller to this fact; and then cites *Case vs. Citizen's Bank*, 2 Woods, 23, that a Bank is insolvent only when it is unable to meet the demands actually made upon it. Counsel thus tries to deduce the rule that the Directors of the American would not be justified in doing anything whatever. We apprehend that the banking world, the financial managers of the country, act upon the reasonable rule that the Board of Directors shall take all usual and safe means to prevent the failure of the institution and the closing of its doors, to the damage and distress of depositors. We ask, what, in the light of the subsequent facts in this case, would have been the

result if the wise course adopted by Mr. Kimball had not been taken?

Mr. Baird's testimony shows that the American Directors acted on the fact that the funds of the American were to quite an extent invested in securities upon which quite a time must be taken to realize and that depositors could not be paid by the American without the money was borrowed of the Union National Bank. In the face of the facts, who can doubt the wisdom and fortune also of the Directors of the American borrowing this money? We say borrowing, for we cannot allow ourselves to believe that any practical, legal or judicial mind can sincerely regard the transaction in any other light. The use of the word and idea of a sale is an utter absurdity. The looseness with which the contract was drawn, and the fact that any attorney would leave such important interests designated as a sale is not creditable to his ability or care. The money taken by the American under this contract to pay its depositors and other banks reached the large sum of over $200,000.00, while the sale included $3,500 worth of furniture. We look to the whole contract and the thought of a sale disappears and the transaction stands out clearly as a Bank in necessity borrowing money of another Bank to relieve its wants in this regard. What higher or more strict act of banking can be imagined or require the wisdom of Directors?

The Court of Appeals of the Eighth Circuit had a very similar case before it in *Schofield vs. State National Bank*, 97 Fed., 282, and we adopt the third paragraph of the syllabus, which also might appropriately be used in the present case:

> "A contract by a national bank to assume and pay the liabilities of another bank in consideration of the transfer to it by the other bank of its office furniture and its cash and cash assets, and the further assignment to a trustee for its benefit of bills receivable and

securities is not *ultra vires'* but is within its power conferred by statute to conduct a general banking business.

The doctrine of *ultra vires* would be a most strange rule to invoke when the American National Bank received every dollar borrowed by its Directors under this Contract, had its own chosen and trusted officers to handle and collect its assets pledged to the Union National and the money applied to the payment of depositors and Banks of whom it had obtained money.

What would be thought of an individual who would seek to repudiate such an obligation? The moral law of honor has always been applied by Courts of Justice in their decisions regarding the obligations of institutions as well as the just obligations of men. Corporations and Banking Institutions are only combinations or aggregations of men, and no matter how insistent the stockholders may be to have the bonds of morals weakened and the ends of justice defeated, still the Courts have ever said:

> "The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."
>
> *Railway Co. vs. McCarthy*, 96 U. S., 258.

The same great doctrine was enforced with vigor and clearness in the following cases:

Beuseik vs. Thomas, 66 Fed., 104;

American National Bank vs. National Wall Paper Company, 77 Federal, 85.

These cases are replete with wise discussion and citation of authorities, showing the rule to be founded as well in authority as in the fundamental principles of good sense.

In the syllabus to *Aldrich vs. Chemical National Bank*, 176 U. S., 611, we find:

> "A national bank which uses in its business money obtained by its vice-president as a loan to it from another national bank cannot escape liability to account therefor upon the ground that the loan was not negotiated by its directors or that it could not itself have legally borrowed the money."

In the opinion in this leading case of the Supreme Court upon the liability for borrowed money, the Court mentioned the prior case of *Western National Bank vs. Armstrong,* 152 U. S., 346, and say:

> "In *Western National Bank vs. Armstrong,* the fendant bank did not receive or get the benefit of the money alleged to have been loaned to it at the instance of its vice-president. This Court took care in that case to say that it did not appear that the bank ever got a penny of the borrowed money or any benefit or advantage whatever by reason of the transaction."

In our case every penny went to discharge the just and necessary debts of the American National Bank. In that case the Supreme Court declared it immaterial whether the borrowing agent had authority or not where the money was used for the use and benefit of the principal, the Bank, seeming to base the opinion upon both the doctrine of estoppel and upon the larger and more general theory that the American National would be "liable for money had and received to its use."

Ditty vs. Dominion National Bank, 22 C. C. A., 376; 75 Fed. Rep., 769.

But in the case at bar the most complete authority existed, for the contract entered into by the American National Bank, was made by the Board of Directors to meet the pressing want of money to pay depositors and pay bills payable, being entered into by the competent authority of the Bank and for a

purpose emphatically of the first requirement in banking and vital to the interest of stockholders. That the assets were worthless to a great extent is the sole misfortune and real cause of this extended litigation. This Court will take judicial notice that many National Banks go out of business and are compelled to borrow large sums of money to pay presently payable debts such as depositors and bills payable, and the closing out of one National Bank and the payment of its depositors by another is a not unfrequent event. And a presumption prevails that the comptroller of the currency has an oversight of the transaction, for certainly his duties are to protect the depositors and to see that the just obligations of the closing Bank are discharged. In the case at bar the record shows a full compliance with the law in the proceeding in voluntary liquidation. The comptroller recognized the acts of the American as being a full compliance with the law for that purpose, and we claim this to be binding upon all the world for the purposes of this case. In fact the counsel admit that all the steps were taken to make a compliance with the law, but claims it was a form without substance—a farce.

Section 2 of the Act of Congress of June 30, 1876, provides:

> "That when any national banking association shall have gone into voluntary liquidation, * * * any creditor of such association may commence a suit in any Court of the United States having original jurisdiction in equity for the District."

The American National Bank had certainly "gone into voluntary liquidation" before the commencement of this case and if every act essential to a complete discharge had not been done, still we cannot see why this suit was not authorized, for the act says: "That when any National Banking Association shall have gone into voluntary liquidation," the suit

may be commenced. The American National Bank, however, did every act required by law and the custom of the comptroller's office. The contention of the counsel that the American did not go into voluntary liquidation is justified neither in fact nor in law, as all acts were done and legally done. Counsel for appellants have made the greatest effort to defeat this case and reverse the decree entered in the Court below upon what they designate as:

Restricted liability of stockholders in National Banks.

Here appellants cite *Schroeder vs. Manufacturing National Bank,* 133 U. S., 67, and *Richmond vs. Irons,* 121 U. S., 27, in support of the general theory that a National Bank may be liable and still the stockholders not necessarily liable. We might not contend with counsel over the existence of the rule of law that a stockholder may go behind a judgment and show that the debt is one for which he as a stockholder is not liable, but we contend that the doctrine has no application to the facts of the case. In the case at bar the obligations of the American were contracted in the very highest act of Banking, that is, for the purpose of paying depositors and other Banks who held its bills for money borrowed. If the Directors of the American National Bank possessed the authority to protect its depositors and to borrow money to discharge the obligations as held in the case of *Schofield vs. State National Bank,* 97 Feb., 282, then the stockholders, of course, will be liable and if the American is liable upon the theory of money had and received to its use and benefit, then we insist that the stockholders are liable also.

> "An action for money had and received is founded upon what the law terms an implied promise to pay what, in good conscience, the defendant is bound to pay. It being his duty to pay, the law implies a promise."

Carry vs. Curtis, 3 How., 236.

The law is again stated in the same case.

> "Wherever the defendant has received money which is the property of the plaintiff and which the plaintiff is obliged by the ties of natural justice and equity to refund" an action lies.

The liability of the stockholder is not increased at all. In the action for money had and received the law raises a promise to pay.

In the early case, *Kennedy vs. The Baltimore Insurance Company*, the second syllabus states:

> "The action for money had and received is an equitable action and the plaintiff, in support of it, can resort to and prove all equitable circumstances incident to his case, and when money was received by an agent of a corporation an obligation was thereby incurred by the corporation."
>
> 3 HARRIS & JOHNSON, MD., 367.
>
> 6 AM., DEC., 386.

The Supreme Court has stated the doctrine thus:

> "When the law imposes an obligation and implies a promise on its part, to refund the money to its owner, such a promise can be enforced by action. Assumpsit will lie whenever the defendant received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund."
>
> BYRNE, ET AL., VS. UNITED STATES, 93 U. S., 642-643.

And the form of the indebtedness or the mode in which it was incurred, is immaterial, and the obligations arising in this manner are binding even on the United States.

UNITED STATES VS. STATE BANK, 96 U. S., 30.

> And, "there need be no privity between the parties, nor any promise to pay, other than what arises and is implied from the fact that the defendant has money in his hands belonging to the plaintiff that he has no right conscientiously to retain."
>
> STATE vs. ST. JOHNBURY, 59 Vt., 332

The utter wantonness of expression by Mr. Morsman, counsel for Morsman appellant, is entirely out of place under the facts of the case. On page number 6 of his brief he says, without any foundation whatever therefor: "The remainder of this large amount of cash was absorbed in the course of this protracted and obviously wasteful liquidation."

These assertions are entirely unjustified and are an attempt to shift the fact of original worthlessness of the assets, into the false idea that the assets became worthless after the borrowing of the money. Mr. Wyman, the cashier, and Mr. Kimball, the president of the American National Bank, acted vigorously and persistently for more than a year and a half in collecting from these assets, and using every effort possible to realize upon the securities and properties of the American. After the collections of the first year all parties began to see how difficult it was to obtain any collections from these assets. After the retirement of Mr. Wyman from the work, Mr. Kimball still persistently pressed the effort to collect, and brought many suits, having Mr. Howard B. Smith, a stockholder and now attorney for appellants Wyman, et al., for his attorney, and the items of expense will show many fees paid to Mr. Smith for his services. In the face of these facts, and after having its cashier and president assisted by the able counsel as above stated, we think it quite unfair and strangely inconsistent to hear counsel assert that any asset was wasted. The trouble is in the fact that the money of the American was invested in many of its loans and by reason of the worthless

character of these loans, the American was truly and really disabled in its finances.

No instance of waste of an asset, no instance of a neglect to press for collection, no instance of the omission of any duty and fidelity on the part of Mr. Wyman or Mr. Kimball, can be shown in this record.

The protracted litigation, if such it is, can be seen for itself and realizing the number and contention of the defendants we feel that complainant is truly alert and vigorous in the prosecution of the suit, to have reached a decree, with all its modifications. This disposes of the assertion of counsel in charging neglect or loss in assets, since this contract was made and reveals clearly that the original and inherent frailty of the assets is the trouble, and that the stockholders are now trying to shift onto the complainant and Union National Bank, a fault existing before the contract was made. And, again, no sincerity can exist in claiming that the Union National Bank has actual possession of these assets, for the contract provides that Mr. Kimball shall have them, and the fact (see Rainey's testimony) is that he had possession at the time of his death. That Mr. Burness then took actual possession of them and under the order of this Court sold and collected the assets coming to him as Trustee, is clearly apparent.

The proceedings were based on the fact of Mr. Kimball's possession and the final order of the Court proceeded on the apparent fact that Mr. Burness had possession, as he testifies he did have.

THF STOCKHOLDERS ARE BOUND EOR THE NOTES AND AGREEMENT OF DECEMBER 21, 1895.

a. Because the agreement was made with authority and in due course of business.

b. Because the stockholders received the benefit of the money, accepted it, and cannot honestly escape contributing to its payment.

Counsel, with his usual ingenuity, has drawn out of this Record a theory under which he hopes to escape liability.

He argues that the transaction of December 21, 1895, was a conditional sale of the assets of the American National Bank, and that the notes in this case were not notes in reality, but just a form, a guaranty evidencing no debt or obligation, for the convenience of the Union National, (p. 46 brief.)

That because the contract says the American National guaranteed the Union National against all loss, "and to that end" agreed to execute and deliver its non-negotiable promissory notes, that these notes were not notes at all, and especially was that true because the Union National was, as far as possible, getting the depositors of the American to bank with it.

We confess we cannot follow the learned counsel in his reasoning. It is impossible to read this contract and the evidence bearing upon it and believe that these notes were meaningless or that the American National was not indebted upon them. The whole course of dealing of the parties was upon the basis of a debt.

Counsel says the assets were "clearly security in addition to the promissory notes," (page 46, brief), but what security is there in a promissory note that is not a note, but merely for "convenience."

No, Your Honors, unfortunate as this transaction has been for the Union National Bank, it never agreed to notes that were not notes or promises to pay that were not promises. Nor did any one of the parties dream that the American National Bank was not liable on these notes.

The testimony of Baird, Wyman and Rainey, quoted by counsel, shows this clearly.

Baird, Director, says, Record, page 151:

> "There yet remained due in order to meet all the obligations of the American National Bank a balance represented by those three notes of $200,000, and those notes were given to secure that balance."

They were returned by Henry F. Wyman, Cashier, and Thomas L. Kimball, President, in the report of the regular stockholders' meeting, (Exhibit 24), in which exhibit the payment of principal and interest on these notes is reported at $22,815.40. So in Exhibit 30, bills payable $167,765.00; so in Exhibit 31; so in Exhibit 33, page 5.

Wyman expressly confirms this in his testimony (page 170, Record), referring to the bills payable, account of July, and the agreement itself shows it in every detail.

But, says Counsel, this was not an indebtedness incurred in the ordinary course of business.

If it was borrowing money just to tide it over its embarrassment it would not have sold all its business and transferred its cash and cash items, etc.

With due deference to the learned counsel, we must submit to the Court that this is not a question whether this borrowing was large or small, whether the result of it was to cause the American National to cease as a going concern, or whether the borrowing was made with liquidation in contemplation or not.

The question is, have the Directors and stockholders of a bank on the verge of collapse and insolvency the right to borrow money and pay their depositors by a pledge of part or all of their assets.

If they have that power then this action was legal beyond question, because the Directors acted and the stockholders ratified it.

Counsel endeavors to distinguish the case of *Schofield vs. State National Bank* 97 Fed., 282, from the case at bar, and says:

> "If the money be borrowed in the usual course and in furtherance of the authorized business of the borrowing bank, the transaction will be *intra vires,* but if it be borrowed for speculation, etc., it would be *ultra vires,*" and, again,
>
> "The Union National Bank knew all the facts and was participant in the illegal purposes."

The purpose was to pay its debts and satisfy its depositors. In that "illegal purpose," says counsel, the Union National Bank "participated."

When counsel, so able and learned as the writer of this brief, is driven to such a claim, his case must be hard, indeed.

If ever money was borrowed for a legal purpose, if ever any bank obtained the benefit of every penny of the money borrowed, the American National did in this case.

But, says counsel, a National Bank when confronted with the fact that it is unable to continue in business, has no power to abdicate its own functions and powers and transfer its assets to others.

In this again counsel is wrong. The National Bank has those rights beyond question. Its only duty is to the Government, its creditors, its stockholders.

The Government assented to this and confirmed it; and by it all the obligations of the Bank to the Government were fulfilled.

By this wise arrangement all its depositors were paid and satisfied.

Its stockholders, by every act, ratified and confirmed this agreement, and Edgar M. Morsman, the client for whom counsel speaks, in express terms ratified this agreement, as

appears by Exhibit 25, page 277, Record, and Edgar M. Morsman is a business man whose good judgment is well known.

When these Directors had fulfilled their obligations to those to whom they were obligated they had a right to cease their efforts.

From the arguments advanced by counsel we think it may be fairly inferred that he concedes that if a bank needed money in order that it might continue to run as a bank, that it could borrow that money from another bank or from an individual, and the act would not be *ultra vires.*

Yet he cannot find any direct statutory authority for the borrowing of money. The Courts, however, hold that it can do so.

STATE VS. FIRST NATL. BANK OF ORLEANS, 88 Fed., 947.

FIRST NATL. BANK VS. EXCHANGE NATL. BANK, 92 U. S., 127.

WESTERN NATL. BANK VS. ARMSTRONG, 152 U. S., 347.

ARMSTRONG VS. CHEMICAL NATL. BANK, 83 Fed., 565.

In the above Armstrong case, in 83 Federal, the borrowing was done by the Vice President, and the money never was turned into the Bank, and the Bank went into the hands of a Receiver, and yet it was upheld.

In that case the syllabus is as follows:

> "The borrowing of money by a bank, though not *illegal,* is so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it the officer or agent acting for the bank had special authority to borrow money."

In the above case of *First National Bank vs. National*

Exchange Bank, 92 U. S., at page 127, the Court construes the meaning of Sec. 5136 of the Banking Act, and, after quoting it, says:

> "Authority is thus given to conduct such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to *meet* all the legitimate *demands* of the business and to enable the bank to conduct its affairs within the general scope of its charter safely and prudently. This necessarily implies the right of a bank to incur *liabilities* in the regular course of its business, as well as to become the creditor of others.
>
> "Its own *obligations* must be met, and debts due to it collected or secured. *The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor.*
>
> "Obligations may be assumed which result unfortunately. Loans or discounts may be made that cannot be met at maturity. Compromises to avoid or reduce losses are oftentimes the necessary results of this condition of things. These compromises come within the general scope of the powers committed to the Board of Directors and the officers and agents of the Bank, and are submitted to their discretion except to the extent that they are restrained by the charter or by-laws. *Banks may do in this behalf whatever natural persons could do under like circumstances.*"

The above language was used by the Supreme Court in disposing of the question as to whether a National Bank in adjusting and compromising contested claims might pay a larger sum than would be exacted in satisfaction of them, so as to thereby obtain a transfer of stocks of railroad and other corporations, in the honest belief that by turning them into

money under more favorable circumstances than then existed, a loss which it might otherwise suffer from the transaction might be averted or diminished.

Counsel for defendants in this case at bar would by their line of argument say, that the above was a pure dealing in stocks of another corporation, and hence *ultra vires.*

It would be strange, inded, if a bank which could thus legitimately acquire stock in various corporations in order to try to prevent further loss to itself and stockholders, cannot borrow money and enter into the contract in this case in order to pay its actual and *bona fide* deposits and bills payable without having the *new* debt *thus* created characterized as *ultra vires* the Bank.

The Supreme Court practically says in the above case that a Bank may do anything a natural person can do in making provision for the payment of its debts. Of course, it could not, if insolvent, secure one creditor to the detriment of another, but as in this case it actually paid *all* creditors by making one new one, and used its "judgment and discretion" in so doing, as this case says it may, it surely has violated no law.

It was clearly within the contemplation of the National Banking Act that a National Bank could *close out* its business as well as *conduct* it.

The construction put upon the law by counsel would give authority to a Bank to borrow money and keep the Bank going, regardless of its interests and those of the stockholders, but no power to borrow money from one to pay the many and then quit business, with no one who could question the transaction.

To show that the National Banking Act contemplates

the borrowing of money and the pledging of assets, look at Sec. 5242, which is as follows:

> "All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, securities on real estate, or of judgment or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with the view to the preference of one creditor to another, except in the payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action or proceedings, in any state, county or municipal court."

It depends then upon what use is made of the money, whether a preference given by an insolvent bank is void or not.

In construing the above section the Fifth Circuit Court of Appeals, McCormick, Judge, holds that a preference given for an actual advance of money which goes to the Bank, and is used for the benefit of the Bank, is good and not void.

Stapleton vs. Stockton, 31 Fed., 326.

In the above case there was a preference of one creditor over others. The receiver tried to set it aside, but failed as to the money advanced at the time.

In our case the money was all advanced at the time and applied to the payment of all the creditors of the Bank in full

theretofore existing, and hence there was no preference over other creditors.

Now, if Sec. 5242 says that a Bank cannot transfer property when insolvent "with a view to prefer a creditor or to prevent the application of its assets in the manner prescribed by the statute," does it follow that if a Bank in distress makes such provision that all its then creditors are paid in full, that it is violating that statute or any other? Is it not doing just what the law would and does require, treating all alike?

In order to do it the American National Bank in this case made itself indebted to one creditor in order that it might pay off all others. It is, it seems to us, folly to say that a Bank has power to run, but no power to stop if it pays all its debts.

We think we have shown that this was a borrowing of money.

This contract cannot be construed in any other way. It was given that interpretation by all parties to it in carrying it out.

The Court will not give it a different interpretation from what the parties themselves have given it, even if it could by any legerdemain be construed to mean anything else.

If the language in this contract is at all ambiguous, the way in which the parties understood it and acted upon it will be of aid to the Court.

> "When the language used by the parties to a contract is ambiguous or of doubtful meaning, the practical interpretation given to it by the parties themselves, when engaged in the performance of the agreement, and before any controversy has arisen concerning it, *is one of the best indications of its true intent.*" (Italics are ours.)
>
> *Schofield vs. State National Bank*, 97 Fed., 285.

Also *Topliff vs. Topliff*, 122 U. S., 121.
Chicago vs. Sheldon, 9 Wall., 50-54.

The case above cited of *Schofield vs. State National Bank* is very similar to the one at bar.

Practically the only difference between that case and this is that that contract or resolutions passed pursuant thereto provided that the Bank assuming the liabilities should not hold the failing Bank nor its stockholders for any deficiency, while in the case at bar the express agreement was to pay the difference, which was made a fixed amount represented by notes bearing interest at a rate certain and payable at a time certain.

The third paragraph of the syllabus in above case is as follows:

> "A contract by a National Bank to assume and pay the liabilities of another bank in consideration of the transfer to it by the other bank of its office furniture and lease and its cash and cash assets, and the further assignment to a trustee for its benefit of bills receivable and securities, is not *ultra vires*, but is within its powers conferred by statute to conduct a general banking business."

Schofield vs. State Natl. Bank, 97 Fed., 282.

The Court will notice the very great similarity between these two contracts, except the difference heretofore pointed out.

It would seem very strange if a court after deciding that such a contract was not *ultra vires* the Union National Bank, which took all the *chances*, would in this case hold that it was *ultra vires* the American National, when it was simply doing what the law contemplates—taking care of its debts, paying its obligations, keeping good faith with its depositors, meeting its engagements which it could do in no other way.

The State Bank in that case, like the American in this,

was providing for payment of its obligations. The Court did not see fit to in any way criticise their action. They were simply doing what the law expected them to do.

Counsel is not fortunate in his attempt to distinguish between the Schofield case and the case in controversy.

The only real distinction that we can see is that in the Schofield case the express agreement was that the stockholders and Bank should not be liable, and in this case the express agreement was that they should be.

The banks in both cases sold their office furniture, fixtures, safe, etc.

The Union National Bank in both cases took possession of the furniture and office of the selling bank. Both banks assumed the debts of the bank transferring its assets.

In both cases the cash and cash items were immediately turned over. The securities in both cases were to a great extent worthless.

The condition of both the American National Bank and the State Bank was practically the same. Neither had committed any act of insolvency, but both could not pay their debts.

So far as abdication of duties goes the cases are on all fours.

And the case in principle and fact is decisive of the question of power in this cause.

The refinement of reasoning in counsel's brief, where he says he finds nothing justifying a conclusion that there was an indebtedness between the two banks, is able and shrewd, and is perhaps the best that can be said on the subject.

When the Union National had assumed the debts of the American it became liable for that two hundred thousand, and

a debt arose from the American to it, which was secured by the notes and the assets.

We cannot tell how much the Union National had paid on December 23. It may have paid one hundred thousand dollars, or it may have paid less; that is immaterial, but the material thing is that the Union National, a solvent, reliable bank, had become liable to pay over two hundred thousand of obligations, and the American National was released and discharged to that extent.

It has been repeatedly held that the borrowing or loaning of a sum in excess of the legal limit is no defense to a suit for the money borrowed.

Considerable stress is laid upon the case of *Richmond vs. Irons*, where a Trustee, long after a bank had gone into liquidation, endorsed paper to creditors, and it was attempted to hold the stockholders on the endorsement.

It was rightly and justly held that such endorsement in law simply passed the title to the commercial paper transferred and did not have the legal effect of a commercial endorsement.

It is plain that the principle here enunciated would have no bearing upon the act of a Board of Directors done with the full advice and consent of the stockholders and with their approval and sanction prior to the resolution of liquidation.

A great deal is said by counsel about the prolongation of the liability of the stockholders.

Now, this contract in itself did not in any degree prolong the stockholders' liability. If these assets were good these claims could be paid off at once.

If it has been prolonged it was caused by the acts of the stockholders themselves, and the nature of the worthless assets which they have foisted on the Union National.

Neither does it lie in their mouths to complain about the

"important and delicate business of liquidating" being "remitted to the integrity and discretion of Kimball," a man they assented to and insisted upon.

It is also claimed by counsel that his client who signed the express ratification of this contract is not estopped because this act is not pleaded, and says it seems to have been procured by Kimball "for some unexplained reason."

It seems to us it would have been better to have said nothing than to have made this lame explanation.

B

THESE STOCKHOLDERS CANNOT ESCAPE LIABILITY BECAUSE THEY RECEIVED THE BENEFIT OF THIS MONEY, ACCEPED IT, AND CANNOT HONESTLY ESCAPE CONTRIBUTING TO ITS PAYMENT.

The doctrine of *ultra vires* will not be allowed by the Courts to defeat the ends of justice or work a legal wrong.

Railway Company vs. McCarthy, 96 U. S., 267.

Before the Court would be justified in holding a contract of a corporation *ultra vires* it ought first to be satisfied that it is not, in so doing, committing a legal wrong. There is no light in which the transaction between these two banks can be viewed by which this Court can say that either was attempting to work any fraud or harm to the other. It was a pure, simple business deal for the relief of the American in a time of distress. Every dollar received went to pay its indebtedness. So far as any act of the officers, directors or the stockholders of the American are concerned, before or after the bringing of this suit, in the evidence or elsewhere, outside of the an-

swers drawn by the attorneys, which they do not undertake to substantiate by proof, there has never been any complaint.

There has not been, nor can there be an authority produced by respondents showing that when a bank, or any other corporation made an honest, bona fide attempt to pay off its depositors or creditors and did so, that the act by which it obtained the money thus used was held *ultra vires* and the person furnishing the money compelled to lose it.

Even in law cases Courts are very careful about doing injustice in its application of the harsh rule of *ultra vires*, but in an equity case, where all the facts are disclosed by the Bill, as in this case, it would surely be carrying such a rule to the extreme.

The rule of *ultra vires* is often applied to prevent a wrong and just as often, and more so, its application is refused when it will produce a wrong.

Courts of Equity are not sitting to commit, or suffer to be committed "moral wrongs." Their mission is exactly the opposite.

We now wish to quote some authorities upon the proposition above set out, and show that in this case these defendants would be estopped to set up the defense of *ultra vires*, even if there *was* anything in it, having received the benefit of this $201,000.00 and not offering to make restitution.

If this is an *ultra vires* contract let them pay the money advanced for their benefit, and which they have received, and do equity before they ask relief.

> "The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."
>
> *Railway Co. vs. McCarthy*, 96 U. S., 258.

The case of *Benseik vs. Thomas*, 66 Fed., page 104, was

a case where a smelting company borrowed money, in direct violation of authority, for the purpose of completing some buildings.

It was held that, although the borrowing was without authority, the doctrine of *ultra vires* would not be applied because they were estopped to deny the authority of the directors to borrow it and were liable for the amount actually received.

This case was decided by the Circuit Court of Appeals, Eighth Circuit, in February, 1895.

The Court in the opinion, at page 110, says:

> "Of this amount, the sum of $10,000 appears to have been used in discharging attachment and mechanics' liens against the company's property. Furthermore, all of the shareholders of the company who took an active interest in its affairs appear to have known that these liens were being paid with money that had been borrowed by some one by authority of the board of directors. Under these circumstances, it is clear, we think, that the smelting company is not in a position to plead 'want of authority' on the part of its board of directors to borrow the money in question, as a defense to a suit by the leaders to recover it. When an act done by a private corporation is not *per se* illegal, or *malum prohibitum*, but is simply *ultra vires*, and is not a matter of public concern, but merely affects the interests of the stockholders, the latter may so act as to deprive themselves of the right to challenge its validity. Thus, in the case of *Kent vs. Mining Co.*, 78 N. Y., 159, a cororation had issued preferred stock to certain of its shareholders in lieu of common stock theretofore held. Although the issuance of such preferred stock was unauthorized, being in violation of a law of the company, yet it was held that holders of common stock who were acquainted with the issue of such preferred stock, and had suffered it to be issued and sold

on the market without taking any steps to arrest the proceeding, were estopped from maintaining an action against the corporation to have the same cancelled. In the case of *Sheldon Hat Blocking Co. vs. Eickemeyer Hat Blocking Machine Co.*, 90 N. Y., 607, the trustee of a manufacturing company had assigned and transferred all of the property of the company in settlement of a judgment against it. All of the stockholders had knowledge of the assignment of the corporate property at or about the time it was made. It was held that, although the trustees had acted without authority in making the assignment, yet, as the shareholders had taken no action to arrest the transfer, and as the act was simply *ultra vires*, they were estopped from maintaining a suit to set the assignment aside. In the case of *Plank Road Co. vs. Murray*, 15 Ill., 336, the facts were that the directors of the company had borrowed money without authority, and had given a mortgage on the company's property to secure it. It was held that inasmuch as the company had received the money and used it, it was estopped from questioning the authority of the officers who had made the loan. Also in *Troup's Case*, 29 Beav., 353, 357, it was decided by the master of the rolls, that, when the directors of a company had no power to borrow money, a person lending money to the company cannot enforce payment of it against the company, unless it has been *bona fide* applied to the purposes of the company, but that, if so applied, a recovery against the company may be had. We conclude, therefore, that because the smelting company received the money that was advanced by Benseik and Wenzel under the authority conferred by the directors to negotiate a loan, and appropriated the same to the payment of its debts and to the completion of its smelting works, the money so advanced is recoverable from the company, and that the by-law above quoted does not

> preclude such a recovery, or impair the validity of the deed of trust as a security for the sum of money actually advanced. A corporation should not be permitted to allege want of authority on the part of its board of directors to borrow money, when it has received a sum of money actually borrowed, and has used it to pay its debts, with full knowledge of the fact on the part of all its directors, and many of its shareholders. A corporation, as well as an individual, is at least bound to act honestly; and it should not be allowed to say that an act done by its officers was unauthorized, when it has accepted the benefits accruing therefrom, and does not offer to restore what it has received."
>
> *Benseik vs. Thomas*, 66 Fed., 110.

The above language is very pertinent to the case at bar. The doctrine there applied is just as applicable to a National Bank as to any other corporation, as is shown in the case of *American National Bank vs. National Wall Paper Co.*, 77 Fed., 85.

In this case a Bank became possessed of a stock of wall paper and formed a corporation to carry on the business. The officers of the wall paper company were also officers of the Bank. The Bank in effect led the creditors to believe that it was behind the new corporation and would guarantee its bills. It afterwards refused to do so and was sued by the National Wall Paper Company for goods purchased. The Bank defended on the ground of *ultra vires*.

Judge Caldwell, on page 93, says:

> "It is next said that the bank had no authority under its charter to buy and sell goods, and that any purchase of goods by the bank, or any one for it, was *ultra vires*, and did not bind the bank. We entertain no doubt of the bank's right to purchase the A. Gau-

thier stock at the sale thereof on the judgment in its favor; and the right to purchase to save a pre-existing debt due the bank carried with it by necessary implication the right to sel l the goods so purchased. How the bank should proceed to dispose of the goods so purchased at the attachment sale, and whether, in order to sell that stock to the best advantage, it could rightly buy fresh goods to mingle with it, we need not inquire; for, conceding that it had no right to purchase any goods, not even those purchased at the attachment sale, its liability to pay for the goods purchased from the plaintiff is not affected on the facts of this case. 'The great mass of judicial authority,' says Judge Thompson, 'seems to be to the effect that, where a private corporation has entered into a contract in excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it.' Thomp. on Corp., Sec. 6016. Continuing the subject, the learned author further says it is a general principle of law that no party will be permitted to set up the defense of *ultra vires* while retaining the fruits or the benefits of the contract. This doctrine rests upon the unanswerable ground thus stated in Pennsylvania by Mr. Justice Porter: 'A man who has enjoyed a privilege has no right to say that because he ought not to have enjoyed it he will not pay for it. However unlawful the act, it would be unsound policy to give him this immunity.' Id. Sec. 6015. The reason of the rule is that honesty and fair dealing are the highest public policy, and that a private corporation, which is a mere collection of individuals, is no more privileged to repudiate its engagements, and act dishonestly, than a single individual is. Id. Sec. 6017. Where, therefore, a corporation purchases property contrary to a prohibition,

or without an authorization in its charter, it cannot retain the property and refuse to pay the price, or set up the defense of *ultra vires* when sued for the same. Id. Sec. 6018. The authorities supporting the text of the learned author are too numerous to require citation. The doctrine has become familiar learning."

American Natl. Bank vs. Natl. Wall Paper Co., 77 Fed., 93.

In the case of *The Sheldon Hat Blocking Company vs. The Eickemeyer Hat Blocking Machine Company*, in 90 N. Y., the Court, at page 613, referring to another case, says:

"It was there held that the acts of a corporation which were not *per se* illegal, or *malum prohibitum*, but which are *ultra vires*, affecting only the interests of the stockholders, may be made good by the assent of the stockholders, so that strangers to them dealing in good faith with the corporation will be protected in a reliance on these acts. That it is not needed in such a case that there be an express assent on the part of the stockholders to work an equitable estoppel upon them. Where they neglect to promptly and *actively condemn* the unauthorized act and to seek judicial redress after knowledge of the commission of it, and if innocent third parties have been led thereby to put themselves in a position from which they cannot be taken, without loss, if the act were held invalid, the stockholders will be estopped from questioning it."

Sheldon Hat Blocking Co. vs. Eickemeyer Hat Blocking Machine Co., 90 N. Y., 613.

We also call attention to the case of *Farmers Loan & Trust Co. vs. Toledo A. A. N. & M. Ry. Co.*, 67 Fed., 49, the syllabus of the case being as follows:

"In an action to foreclose a mortgage securing bonds of a consolidated railroad corporation of Ohio

and Michigan, where, from the time of the consolidation, it exercised the franchise of a consolidated corporation, without objection from the State, or the stockholders, who appeared and voted as its stockholders at its annual meetings, it is a *de facto* corporation, though there was a failure to give the notice to stockholders, or to file the certificate of consolidation required by Rev. St. Ohio, Secs. 3380-3382, and both such *de facto* corporation and its stockholders are estopped to assail its unauthorized existence as a corporation to avoid the bonds."

Farmers Loan & Trust Co. vs. Toledo A. A. & N. N. M. Ry. Co., 67 Fed., 49.

It seems to us that under the undisputed facts in this case and the construction that must be put upon this contract by the Court, being the construction put upon it by the parties themselves, this Court cannot possibly come to any other conclusion than that these stockholders are liable for an assessment and judgment in this case sufficient to pay the amount of money advanced by the Union National Bank for the benefit of the American.

LIABILITY OF SHAREHOLDERS.

The liability of shareholders is for all "contracts, debts and engagements" of the Bank. This liability is fixed by Secs. 5151 of the Revised Statutes, and is as follows:

> "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking

> association now existing under State laws, having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this Title; and if at any time there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions from Chapter four of this Title."

Rev. Stat. U. S., Sec. 5151.

The liability may be enforced by a creditor on behalf of himself and all other creditors, as provided for in Sec. 27 of the Act of 1876, which is as follows:

> "That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes, may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any Court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

The liability incurred under the circumstances of this case before the Bank went into voluntary liquidation is certainly a "contract," a "debt" or an "engagement" of the Bank. Under

these authorities and fact this contract was legally and morally binding upon these stockholders.

Without following further counsel in the special pleading, by which he endeavors to escape this obligation on the part of the shareholders, we quote the language of the Court of Appeals, 135 Federal, 295, where they say, "EVERY CONSIDERATION OF EQUITY, GOOD CONSCIENCE AND JUSTICE LEADS TO THE CONCLUSION THAT THE SHAREHOLDERS SHOULD BE HELD TO HAVE RATIFIED AND APPROVED WHAT WAS DONE AND WHAT WAS BEING DONE."

THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals for the Eighth Circuit, in an opinion to which we can add nothing, affirmed the decision of the Circuit Court below, this opinion appearing in this record and reported in 135 Federal Reporter, page 288.

Counsel for Morseman, on pages 18, 19 and 20 of the brief, has argued with some elaboration against the view expressed by that opinion, but it will be seen upon examination that counsel's line of argument is entirely opposed to the course of judicial decision and would if adopted relegate the law relating to the winding up of the National Banks to the State Courts in most instances, and deprive these laws of the uniform character, which was intended to be maintained by the Federal control.

This contention is opposed, not only to the purpose and object of these statutes, but to the uniform construction of the Federal Courts in every case which has come before them.

A long argument is also made to show that because Kimball was agreed on as the agent to liquidate that therefore the American had nothing to do with the liquidation. This claim

is on a par with many others made by the defendants in their attempts to escape liability.

The American National Bank insisted on Kimball retaining the assets and making the liquidation, appointed him their agent to liquidate and controlled that liquidation through Kimball down to the day of his death.

Every Bank that appoints an agent under the law to liquidate parts with its control. The American did neither more nor less than any other insolvent and liquidating Bank.

Every insolvent Bank loses its control. But to argue that because this Bank by reason of its insolvency and inability to do business can therefore escape its debts or avoid its contracts would be to offer a premium on insolvency and a prize for incompetency.

It is further claimed that there is no jurisdiction under the act of Aug. 13, 1888.

We have read with diligence the argument of counsel under this head, but with due deference to the learned and able counsel we cannot catch the distinction attempted to be made in his argument. Certainly the bill in this case sets out a suit against this insolvent National Bank, to enforce a specific lien, to call the Bank into Court, and to reach by judicial process not only the tangible assets in the hands of the agent and trustee, but also the fund available by law in the ratable liability of the stockholders, and having by process taken these questions and assets into Court to have them by proper decree administered and distributed and the affairs of the Bank wound up. That this presents a Federal question and carries jurisdiction cannot be fairly denied and the cases so universally hold.

Connected with this argument it is attempted by statement and intimation many times in the brief to eliminate Kim-

ball as the agent of the American National Bank and put him forward as the representative of the Union National Bank. Thus on page 28 the statement that "the assets at the time of the commencement of the suit were in the possession of the Union National Bank"—on page 27, "the fact that Kimball was president of the American National is unimportant." On page 26, "having agreed that the Union National should conduct the liquidation under the direction of Kimball." "Kimball as agent for both parties,' page 26, and other like statements.

Now all these statements are incorrect. The assets were not in the possession of the Union National Bank at the time of the commencement of this suit or any other time. The fact that Kimball was the president of the American National Bank is not unimportant. It is important because it indicates why he was chosen by the American National Bank to liquidate its affffairs as its agent, and because the agreement expressly provides: *"The party of the second part shall have and hold said assets and profits subject to the right of said Thomas L. Kimball, or his successor, to collect and convert the same into cash for the uses and purposes hereinbefore expressed."* See agreement, page 5, this brief.

And that Kimball, "or his successor, shall represent in said liquidation the stockholders of the party of the first part, *and shall receive, hold and use the proceeds of the assets of the party of the first part as trustee of the parties hereto for the mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary court charges and attorneys fees attending such liquidation shall be incurred under the direction of the said Kimball or his successor.*

UNDER THIS CONTRACT KIMBALL HAD THE SOLE RIGHT TO COLLECT AND CONVERT INTO CASH AND IN SO DOING HE REPRESENTED THE STOCKHOLDERS OF THE PARTY OF THE FIRST PART. BUT HE RECEIVED, HELD AND USED THE PROCEEDS AS TRUSTEE OF BOTH.

The liquidation was entirely under his control as the representative of the American National Bank. His only duty to the Union was to pay over the proceeds, as trustee. With these indisputable facts in our minds we may eliminate all the argument about the American Bank having nothing to liquidate and about its having no control. It had all the control; it named its agent, its agent managed the liquidation and controlled the expenses thereof.

He managed these assets as agent of the stockholders, as an agent under the Federal law, and as a Trustee of the proceeds, and the contract was expressly arranged so as not to conflict with his agency and representative of the stockholders of the American National Bank under the liquidating proceedings.

The proceedings in voluntary liquidation adopted by the American National Bank were in pursuance of the contract with the Union National Bank, were strictly in accordance with law, and by means of these proceedings Kimball was an agent under the Federal Statute, as well as a Trustee under this agreement. This was the view taken by the Court of Appeals. See 135, Federal, page 294, and is the only view that can be taken of these facts.

From its inception this case shows a controversy arising under the laws of the United States, equities to be adjusted under these laws, funds to be collected and administered under

such laws, and a bank business to be administered and wound up.

The cases cited in the opinion rendered by the Court of Appeals below in support of its opinion and judgment in this case contain no case so strong as the case at bar.

Under agreement in the Court below these cases were all tried together; we suppose that agreement still holds, but, however that may be, we see no object in filing more than one brief in these various causes depending, as they do, upon the same record, and coming up on appeal from the same decree.

THE BRIEF OF MR. SMITH.

Our brief thus far was prepared in answer to that of Mr. Morsman, and we will now consider as briefly as possible the argument and brief of Mr. Smith.

It is first contended by Counsel for Wyman and Frenzer that the Court below was without jurisdiction, for the following reasons:

1. Because the American National Bank had not gone into voluntary liquidation.

2. That no bill had been filed by a creditor in the nature of a creditor's bill.

3. Because the defendant has been denied the right to trial by jury.

4. Because an action by a creditor conflicts with the United States Banking law.

5. Because the federal statutes indicate that the proceeding by a stockholder is simply ancillary.

6. Because the creditors in this case, claiming a lien

upon all the assets, could not file a bill in behalf of all other creditors.

The objections set out numbered fourth and fifth we do not wish to particularly refer to; the fourth, because it has been covered by what has been heretofore said, the third because the question has been settled so often that it is hardly open to discussion.

We shall treat these in their order:

THEAMERICAN DID NOT GO INTO VOLUNTARY LIQUIDATION.

To say that the American National Bank did not go into voluntary liquidation is, it seems to us, treating facts but lightly.

On January 14, 1896, at the regular annual meeting of the stockholders, the following resolutions were passed:

> "Resolved, That the directors of the American National Bank, of Omaha, Nebraska, be and hereby are instructed to take action looking to the liquidation required by law."

On January 17, 1896, the Board of Directors met and issued the following to the stockholders:

> "Resolved, That the American National Bank of Omaha, Nebraska, be placed in voluntary liquidation, under the provisions of Sections 5220 and 5221, U. S. Revised Statutes, to take effect the 25th day of February, 1896, and that Thos. L. Kimball be, and hereby is, appointed the agent and trustee of the shareholders of said bank to effect such liquidation.
>
> "It is desired that each shareholder be personally present or represented by proxy at the called meeting. No officer or director of the bank can act as proxy, and

it is suggested that Mr. John L. McCague or Mr. Alex. G. Charlton are eligible to vote your stock."

On February 25, 1896, the stockholders met, and by a vote of 1639¾ aye, and 56¼ no, passed the resolution, page 266, record.

The Comptroller was duly notified, page 267, record, and the liquidation was approved by James H. Eckels, page 269, record.

After such a record it seems unnecessary to further comment on this claim.

But, it is said, this liquidation was a sham and pretense; there was nothing to liquidate.

To this we might well answer, it is immaterial how much a bank has when it liquidates, it is the fact of its going into liquidation that is material, and stop at that.

But the contention is untrue in fact. The agreement between the Union National Bank and the American expressly provided that the liquidation of these assets assigned and transferred to secure the three notes of $67,000 each was to be under the control of T. L. Kimball, the President of the American National Bank, and the agent and trustee of that Bank under the resolution of the stockholders of January 17, 1896.

The agreement between the two banks expressly says on this point:

> "That such liquidation shall be conducted under the direction of Thomas L. Kimball, or such other person as may be agreed upon, *on behalf of the stockholders of the party of the first part* (the American), it being understood and agreed that said Kimball, or his successor, *shall represent in such liquidation the stockholders of the party of the first part, and shall receive, hold and use the proceeds* of the assets of the party of the first part *as trustee of the parties hereto* for the

mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary Court charges and attorney's fees attending said liquidation shall be incurred under the direction of the said Kimball, or his successor."

The language of this contract makes the marked distinction between the assets before liquidation and the proceeds after they are liquidated and become money.

As to the assets and the liquidation, they were held and conducted by Thomas L. Kimball, or some one to be agreed upon in behalf of the stockholders of the American National Bank, and in that possession and liquidation he represented them alone.

But as to the proceeds, he received, held and used them as trustee of both parties under the agreement.

From this it is clear that Kimball held all these assets for the stockholders of the party of the first part, but was a Trustee for both of the proceeds, bound as to such proceeds to the trust created by the agreement.

And so carefully was this right guarded that in clause three (record, page 252) even the ordinary clause usual in all forms of assignment, mortgage and pledge, where the agreement says, the party of the first part agrees to sell and assign, etc., is immediately followed by the words, "with the understanding and agreement that the party of the second part shall have and hold such assets *subject to the right of the said Thomas L. Kimball*, or his successor, to convert the same into cash for the uses and purposes hereinbefore expressed.

Not only did the American resolve to liquidate, but it preserved in the hands of its own agent and trustee the control of that liquidation in the strongest possible language, and until the day of his death Kimball controlled the assets of the American National Bank, collected its money and paid it out.

THE CONTENTION THAT THE STATUTE MEANS A JUDGMENT CREDITOR IS UNSOUND, AND THE FEDERAL COURT ON THE EQUITY SIDE HAS JURISDICTION TO SUSTAIN A BILL BROUGHT BY A GENERAL CREDITOR UNDER THE STATUTE.

It is argued in appellant's brief that the language "may be enforced by any creditor of such association by bill in equity in the nature of a creditor's bill," means only a judgment creditor.

This contention not only is in the face of the statute which plainly says *any creditor*, but it is plainly antagonistic to the purpose of the statute.

Without this statute, as has been held in *King vs. Pomeroy*, the judgment creditor or lien holder might maintain his bill in equity. This statute did not take away any equitable rights.

But because, to exhaust the remedy at law in cases like these of National Banks, would practically destroy the benefit to the creditor, this statute was passed giving to *any creditor* the right to file a bill in the nature of a creditor's bill, thus affording a speedy and efficient remedy to a creditor.

A line of decisions lately rendered in the Federal Court in analogous cases, in which these principles are adjudged and approved, will be found in:

Darrigh vs. H. Wetter Manf. Co., 78 Fed., 7;
Nat. Security Co. vs. State Bank, 120 Fed., 593,
and
Jones vs. Mutual Fidelity Co., 123 Fed., 508.

In these cases the argument of counsel that there can be no creditor's bill in a Federal Court, unless the creditor has

reduced his claim to judgment, are considered and held to be without merit; the very line of cases cited by counsel, *Hollins vs. Brierford Co. & I. Co., Scott vs. Neely*, being considered and shown not to be in point.

And these decisions were in cases where the right sought to be enforced was created by a State Statute, while in the case at bar the jurisdiction is expressly conferred by Federal Statute, and the right to any creditor to file a bill in the nature of a creditor's bill in that forum is given in terms; a very much stronger case.

The reasoning of these opinions is able and convincing, and commends itself to common sense, and to those who believe that law should be so construed as to be beneficial and remedial.

In *Darrigh vs. H. Wetter Manf. Co.*, Sanborn, Judge, says:

> "Rights created or provided by the statutes of the states to be pursued in the State Courts may be enforced and administered in the Federal Courts, either at law, in equity, or in admiralty, as the nature of the new rights may require. * * * An enlargement of equitable rights by the statutes of the states may be administered by the national Courts as well as by the Courts of the states. * * * 'A party, by going into a national Court, does not lose any right or appropriate remedy of which he might have availed himself in the state Courts of the same locality.' * * * Tested by these rules, the jurisdiction and power of the Circuit Court of the United States to seize and sell the property of this insolvent corporation, at the suit of a simple contract-creditor, under the statutes of the State of Arkansas is not doubted. Creditors and stockholders had no right, without such a statute, to have a receiver of a corporation appointed, to have its property sold,

and to have its proceeds distributed pro rata among its creditors, simply because it was insolvent. The statute created that right."

And again:

"It deprived every creditor of the right to collect his debt of an insolvent corporation by an action at law, an attachment or a judgment. It made every lien he obtained according to the course of the common law void, if it was attacked within ninety days after it was 'sought to be otbained.' * * * Moreover, if a creditor was first required to obtain judgment and a return of an execution *nulla bona* before he could proceed under this statute in the Federal Court, he would, in effect, be deprived of the right to proceed at all. His execution could generally be levied upon sufficient property of the insolvent corporation to satisfy his debt, so that he could not obtain a return *nulla bona*, and therefore could not proceed in equity. Yet his judgment and execution would be futile, because some other creditor or some stockholder would proceed under the statute to vacate his judgment and thus he would be deprived of all remedy against an insolvent corporation in the national Courts, either at law or in equity."

In *Jones vs. Mutual Fidelity Company*, Bradford, Judge, in the course of an exhaustive opinion, says:

"There are two points of difference between the Arkansas statute and the Delaware statute. Both statutes create a substantial equitable right and an equitable remedy for its enforcement, but, while the Arkansas statute expressly renders nugatory such proceedings at law as are calculated to defeat the statutory right, the Delaware statute does not expressly do so. The right conferred by the latter statute is, however, wholly inconsistent with and practically would be nullified by an exhaustion of a legal remedy on the pecuniary

> demands of creditors. In either case an exhaustion of a legal remedy would be inconsistent with the due administration of the statute and destructive of the right thus conferred."

And again he says:

> "But I know of no case in which the proposition, either in terms or in substance, has been advanced that, where the object of the suit is the enforcement of a substantial right in equity created by a state statute, and the exhaustion of a legal remedy would necessarily defeat the object of the suit, such legal proceedings would furnish a plain, adequate and complete remedy for attaining the object of the suit, such a proposition on its face is an absurdity."

Jones vs. Mutual Fidelity Co., 123 Fed., 527.

The reasoning in these cases under the State Statutes applies with double force to the case at bar under the Federal Statute. In neither could the creditor derive any preference from his judgment or action, in both the delay by such action would render the benefit of the Statute nugatory.

Applying these rules to the case at bar; what must the Court do to sustain the contention of these defendants?

The Court must hold that the creditor must bring suit and have a jury trial and judgment and execution before he can proceed against these assets and to enforce his claim against these stockholders, such legal proceedings would necessarily, by delay, defeat the object and purposes of the suit and such ruling "would be an absurdity on its face."

In order to be able to commit this absurdity and deprive the statute of its plain meaning, this Court must change the meaning of the statute and say, when the law says any creditor, it means any judgment creditor.

And finally this Court must say, we can enforce a gen-

eral statute of a State on the equity side of the Federal Court giving a general creditor equitable relief. But we cannot do it under a Federal statute expressly authorizing the procedure, and in terms giving and granting equity jurisdiction therefor.

It appears to us scarcely necessary to do more than clearly set out this argument to refute it.

Equally without merit are the claims that defendants have been deprived of jury trial, or that under our construction of the law a creditor for a small amount might inflict great hardship.

Neither is there any force in the contention that the Court had no jurisdiction of the Bank; that we have answered before, and in the *King-Pomeroy* case the Bank was declared to be a necessary party to fix the various liabilities.

Again, we do not agree with counsel in his contention that there is no jurisdiction through the general equity powers of the Court. While it is true that this bill, as we have shown, under the Federal Statute, gave the Court jurisdiction, we have no doubt that this suit, covering, as it did, the enforcement of our contract lien, the disposition of the remaining assets of a National Bank, and seeking by its prayer the enforcement of the trust and lien, the sale of the tangible property, and the ascertainment of the fund to come from the stockholders ratably, carried with it jurisdiction by reason of this trust under the general equity powers of the Court had there been no Federal Statute specifically authorizing it.

This evident truth cannot be more strongly asserted than by the language of Judge Sanborn in *King vs. Pomeroy*, 121 Federal, 291, where he says: "This liability of stockholders is as much a trust fund or the pledge of a trust fund for the benefit of creditors, as any of the tangible property of the corporation, and the enforcement of this liability and the dis-

tribution of the proceeds as much a part of the liquidation of the debts of the bank as the collection or distribution of the proceeds of the bills receivable, or any other assets."

And in the same case he says the ascertainment of the debts and liabilities of the bank and the judicial determination of the necessity, and the requisite extent of the enforcement of the stockholders' liability are essential prerequisites to the collection of the amounts owing by them, and the insolvent bank is a necessary party to these adjudications.

King vs. Pomeroy, 121 Fed., 295.

Under this rule the cases all say that the general creditor interested in a trust fund, or having a lien thereon, can enforce the trust under the general equity powers of the Court.

And in the case of a National Bank the Federal Court alone can adjudicate the ratable liability of the stockholders and distribute the assets.

So that on every ground the jurisdiction of the Circuit Court was clear to adjudge and determine this matter under its general equity powers for the purpose and under the principles laid down by Judge Sanborn as above, and under the Federal Statute affording an adequate remedy and speedy adjustment of the rights of the parties.

Upon either or both of these grounds the jurisdiction of the Circuit Court was clear and certain.

THE QUESTION OF WALLACE BEING THE ASSIGNEE OF THE NOTE IS IMMATERIAL. THIS ACTION IN ANY ASPECT IS FEDERAL IN ITS CHARACTER AND CARRIES WITH IT JURISDICTION IN THE CIRCUIT COURT.

As we have already presented this question in the first part of this brief, we will dismiss it with a few words.

Any suit brought by a creditor to enforce a liability of a stockholder of a National Bank, or for the purpose of winding up a National Bank and distributing its assets, is one within the jurisdiction and cognizance of the Circuit Court of the District where the Bank is located.

This suit is both, and maintainable upon either ground.

We confess to being somewhat dull of comprehension as to the exact meaning of clause 6 on page 28 of the brief of counsel for Wyman, et al. We see no reason why a sole creditor could not file a bill for himself and all other creditors. If there were no other creditors no harm would result. We think counsel's fears in this matter actuated more by a desire to escape the judgment below than by any particular difficulty in this case.

Neither do we agree that "if complainant had appealed to the general equity jurisdiction of the United States Court he would have failed." We think the trust in the assets of the American National Bank and the trust fund pledged by the stockholders would, under the rulings of this Court, sustain this suit even in that aspect.

But, as we have said before, we have ample authority for this suit under the Federal Statutes and the jurisdiction granted thereby.

The decree is correct in holding these defendants as shareholders. The acts of the officers were proper and within their authority.

Defendants under this head cite several cases where the power of a bank to take stock for a doubtful debt. 92 U. S., 122. To borrow money temporarily, *Western National vs. University*. To discount notes, *U. S. National Bank vs. First National Bank*, 27 U. S., App., and 49 U. S. App., affirmed in

U. S. Supt. Ct. 174 U. S., 125, *Anten vs. U. S. Nat. Bk.* and *Aldrick vs. Chemical Natl.*, 176 U. S.

In all these cases the Court sustained the power and held the Bank liable.

But, says counsel, page 37 brief: This was done in good faith. The money was borrowed by the Bank, it was used by the Bank, etc. Let us say to counsel there is not a case there cited as strong as the case at bar.

In this case, at the request of the directors of the American National Bank, to save it and its depositors, the Union National paid out $201,000, and paid every debt of the American, taking the American's notes for it, secured by its tangible assets.

This contract made by the directors was brought before the stockholders of the American, and they expressed the approval of it in the meeting, and with but one dissenting vote ratified it by electing the selected man under the contract as the stockholders' trustee to carry it out; ratified it again by the acceptance of $201,000 worth of benefits paid to save them from immediate and overwhelming ruin.

We should indeed inquire the purpose for which this money was borrowed and when we find that it was borrowed to pay the debts of the American National bank and that it did pay those debts, as this record show without dispute, no court of conscience will chop straws about the responsibility.

It is asserted, somewhat unnecessarily, it appears to us, under the facts in record, that it was necessary for the complainants to show the statements and advises of the various state and county officials who had funds in the American. We think not. The record shows that the county officials had good reason for their fears.

Upon page 35 counsel says that Complainant had not shown that the Union National Bank had paid the obligations

of the American. On the contrary, the proof shows that the Union paid the debts of the American.

The proof is abundant that the contract of the Union to pay the indebtedness of the American was carried out.

(Wyman's testimony, record, page 178.)

One hundred and fifty thousand dollars was paid within thirty days after the agreement was made.

(Rainey's testimony, record, page 196.)

(Wattles' testimony, page 241.)

And the Court found that the only indebtedness of the American National Bank was $194,466.35, the sums it owed on the three notes due to Sumner Wallace, $46,524.83, to the Union National Bank, $147,941.52. (Record, page 132.)

Some complaint is made by the defendant of the slowness of the liquidation. But it was conducted by Kimball, a man representing the defendants only in the collection of this money, and specially selected by the defendant.

No one has suffered more by reason thereof than the Union National Bank who loaned this money to pay off these depositors.

The cases in the Federal Court without exception sustain the liability of a National Bank for money obtained by discount, by borrowing, and the attempt of counsel to distinguish between them is without merit.

As near as we can understand the argument of Counsel in his analysis of the authorities from his brief, it is that it was not the business of the American National Bank to pay its depositors; that an arrangement by which these directors paid them was a fraud upon the stockholders, as *ultra vires*. In this, however, we think the Court will not agree with them.

THE TRANSACTION IN THIS CASE AND THE DEFENSE OF ULTRA VIRES AND RESTRICTED LIABILITY OF STOCKHOLDERS.

In December, 1895, the American National Bank was embarrassed and financially insolvent. Its danger was imminent and overwhelming.

Through its principal stockholder, William Minot, and Mr. Baird, one of the directors, it appealed to the Union National Bank for relief.

The Union National Bank, under the agreement in writing, in evidence in this case, advanced to that Bank $240,000 in money, and paid off the depositors of the American and its other debts.

To these advances it received cash items about $39,000, and for the balance three notes of $67,000 each, one of which is now held by the Complainant Wallace.

To secure these three notes the assets were pledged to the Union National Bank by the usual words, but by express contract they did not pass to the Union National as is customary in such cases, but were to be controlled and collected by Thomas L. Kimball, the president of the American, who, by a resolution passed a little later, was made agent and trustee of the American National Bank.

This agreement was by vote of the Board of Directors, and was approved by the conduct and action of the stockholders, and under this agreement the American National obtained $200,000 of the money of the Union National Bank in the hour of its need.

At the time these assets were pledged for these notes, it was believed that they were more than ample to pay them. Their worthlessness, however, soon became apparent, and not-

withstanding the utmost efforts of Mr. Kimball the deficiency upon these notes was $194,466.35.

It is now contended that this contract was *ultra vires* the American, and that even conceding it binds the American National, it is not a liability of the stockholders.

As conceded by the defendants, a National Bank has authority to borrow money for proper purposes. This Bank by this contract did borrow money. The only question remaining is, was it for a proper purpose?

If to pay the depositors and to satisfy the debts of the Bank is not a proper purpose then it is impossible to conceive one.

The first duty of the American National Bank was to those it owed, and by this contract they were saved and paid.

And these stockholders were liable to pay these depositors. It was an obligation for which they were bound.

Not only so, but all these stockholders ratified this agreement, some even in express terms, and all by their conduct and actions.

Counsel, on page 59 of this brief, makes a somewhat naive argument for several of his clients, who, in express terms, ratified this agreement. They ratified it, says counsel, because they thought the assets would pay off the debts, and therefore they ought not to be held "by this paper evidence."

We think counsel should have gone a little further back and claimed that they should not be held because when they subscribed for this stock they thought they were going to make money.

But, however that may be, we do not think the stockholder who signed this paper is held any more than the others. They all knew it; they all took the benefit of it; they all

stood by while the bank's debts were paid off; assented to it; agreed to it, and ratified it, and they are all held for it. Not one of them has the face to come forward and deny that they knew of all these facts and assented to them.

When any bank becomes embarrassed, it is out of the ordinary it is true, but it is strictly within the business and duty of the directors to borrow money and pay the depositors; it is the highest duty they have.

It is probable from the evidence in this case that all the parties thought this borrowing would be temporary, and the tangible assets would pay it off. But are we to say that because the tangible assets were worthless the stockholders are to be relieved from paying; that because the Bank did not continue business it should not pay its honest debts.

But now, after these debts are all paid off, after the Union National has put over two hundred thousand dollars into this contract, and stands to lose, even if it wins this suit, over one hundred thousand dollars, these stockholders by every technicality in their power, resist contributing to this loss.

They aver that the arrangement by which their directors paid the depositors was not in the ordinary course of business of the Bank; that it was not a temporary borrowing, and has taken a long time; that the assets have not paid the notes as they really expected they would; that, having made this contract, the Bank did not continue business as it should.

That they are deprived of a right to a trial by jury; that a creditor might only claim to be one and not be really so; that the complainants did not present the notes for payment to the association, etc., etc., etc. All these are trivial and sufficiently without merit. But it remains for counsel for Wyman and Frenzer to out Herod Herod with this statement on page 21.

1. Ratification by implication is founded upon estoppel

and the doctrines of estoppel can be applied only to persons individually, not en masse. No official action was taken by the shareholders in meeting assembled and none of these appellants did or failed to do anything from which ratification could be implied. Their silence could not affect their rights, as the duty to speak was not imposed on them. Nor would protest or action have benefited either them or the Union. They received no benefits from the transaction, but if they had the benefits were not the result of their desire or their action.

2. There was no express ratification such as could give validity to the original transaction, because the shareholders signed Exhibit 25 individually. Nor does that paper, which was signed by some shareholders only, impose any new contractual liability upon them. Nor does it estop them, because it was not intended to do so and was not an inducement to the Union to change its position.

If this statment is made seriously it is, in its way, unique. First, the stockholders who attended the meetings and in a body expressed their approval, acted en masse, and therefore cannot be held to have ratified. Second, the stockholders who expressly, in writing, ratified the contract (see Exhibit 25), of whom Wyman was one, cannot be estopped or held to have ratified because they acted individually. So that neither, by combined or individual action, can they be held to have ratified the acts of the Bank.

It is, moreover, a strange sense of moral obligation that argues in a Court of Equity that these stockholders could thus obtain over two hundred thousand dollars to pay their obligations, and then repudiate the transaction into which they had invited the other party, by their acts and conduct. Well may the Court of Appeals say, it is not necessary to enquire further, *"Every consideration of equity, good conscience and justice leads to the conclusion that the shareholders should be*

held to have ratified and approved of what was done and what was being done."

DO THE STATUTES RELATING TO NATIONAL BANKS REQUIRE THAT SUCH A DEFENSE BE SUSTAINED.

This was the language of Mr. Justice Harlan, in the case of *Aldrich vs. The Chemical National Bank*, 176 U. S., 618.

It was language used in reference to a case in which the president of the Bank had, through manipulation, defrauded the Bank of $300,000.

It was the language used when the stockholders had some cause of complaint; and where the Court held that the borrowing was without authority.

The Court in this case brushes away the technicalities under which this wrongful defense is attempted in the following language:

> "These powers are such as are required to meet all legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had specific authority to borrow money. Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity National Bank to borrow $200,-

000 on time, it is yet obvious that the vice-president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers. Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money, and that the bank cannot be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown. * * *

"We have, then, a case in which a national bank having used in its business money which its vice-president obtained as a loan to it from another national bank denies all liability to account for the same upon the ground that the loan was not negotiated by it or by its direction, as well as upon the ground that it could not itself have legally borrowed the money from the other bank. Do the statutes relating to national banking associations require that such a defense be sustained? This question is recognized by the Court as one of great importance, and has received careful consideration in the light of the adjudged cases. We preceed to the examination of these cases.

In *Merchants Nat. Bank vs. State Nat. Bank*, 10 Wall., 604, 644, 19 L. ed., 1008, 1028, in which one of the questions was as to the liability of a bank on account of certain certificates issued by its cashier and of certain purchases of gold made by him, the Court said that if the certificates and the gold actually went into the bank which the cashier assumed to represent, then the bank was liable for money had and received, whatever may have been the defect in the authority of the cashier to make the purchase.

"In *Marsh vs. Fulton County*, 10 Wall., 676, 684, 19 L. ed., 1040, 1043, it was held that 'the obligation

to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' * * * *

"Without further citation of cases we adjudge, both upon principle and authority, that as the money of the Chemical National was obtained under a loan negotiated by the vice-president of the Fidelity Bank who assumed to represent it in the transaction, and as the Fidelity Bank used the money so obtained in its banking business and for its own benefit, the latter bank having enjoyed the fruits of the transaction, cannot avoid accountability to the New York Bank, even if it were true, as contended, that the Fidelity Bank could not consistently with the law of its creation have itself borrowed the money. When, as the result of its arrangement with Harper as vice-president, the Chemical Bank credited the Fidelity Bank on its books with the sum of $300,000 the former thereby undertook to pay the checks of the latter to the extent of that credit. And, as already stated, that credit was fully exhausted by the payment of the checks of the Fidelity Bank drawn in the ordinary course of its business. If the latter bank in this way used the money obtained from the Chemical National, it is under an implied obligation to pay it back, or account for it to the New York bank. It cannot escape liability on the ground merely that it was not permitted by its charter to obtain money from another bank. * * * If sued by the borrower for the amount of such surplus, could the bank successfully resist the payment on the ground that the statute forbade it to make a loan of money on real estate security? Common honesty requires this question to be answered in the negative. But it could not be so answered if it be true that the Fidelity Bank could use in its business

and for its benefit money obtained by one of its officers from another bank under the pretense of a loan, and be discharged from liability therefor upon the ground that it could not itself have directly borrowed from the other bank the money so obtained and used. There is nothing in the acts of Congress authorizing or permitting a national bank to appropriate and use the money or property of others for its benefit without liability for so doing. If the Fidelity Bank did not itself borrow this money from the Chemical Bank, although the latter bank in good faith believed that it did, then the crediting of the former upon the books of the latter with $300,000 was a mistake of which the Fidelity Bank was not entitled in equity and good conscience to take advantage, and from which it should not be permitted to derive profit to the prejudice of the other bank. So, if the Fidelity Bank took the benefit of that credit with knowledge of all the facts, then its defense is without excuse and immoral. If it innocently availed itself of that credit without knowledge of the facts, the principles of natural justice demand that it be held accountable for the money of another bank which it used in its business without giving any consideration therefor."

Aldrich vs. Chemical National Bank, 176 U. S. Sup. Ct., 618.

If this is the language of the Supreme Court in a case where the borrowing had been without authority where the act of borrowing was not only without authority, but resulted in a great loss to the Bank itself, what shall we say of this case, where the borrowing was by vote of the Board of Directors with the consent and approval of the stockholders in their meeting and elsewhere; where every dollar went for the benefit of the American National Bank, and the stockholders; where everything was in good faith from beginning to end?

What shall we say of the defense made here; a defense which the counsel who wrote this brief said, when he argued this case below, might result in a moral wrong, but would be legal?

We do not think this defense can or will be sustained. Having had the benefit of this the stockholders must contribute. Any other course would be immoral and in violation of common honesty in business transactions.

Any other course would violate "every consideration of equity, good conscience and justice."

R. S. HALL,
JAMES M. WOOLWORTH,
Counsel for Appellees.

Supreme Court of the United States.

No. 191.—October Term, 1905.

Henry F. Wyman et al., Appellants, vs. Sumner Wallace et al. } Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

[April 2, 1906.]

Prior to December 21, 1895, the American National Bank and the Union National Bank, hereinafter called respectively the American and Union Bank, were each engaged in business in the city of Omaha, Nebraska. During that month the American Bank was in such financial condition that it became necessary for it to provide for the payment of a large amount of deposits on or about January 1, 1896, and though possessed of abundant nominal assets did not have sufficient funds to make such payment. It knew that a neglect to pay would precipitate a run and bring on a failure of the bank. Thereupon in order to obtain the money necessary therefor its officers and leading stockholders entered into negotiations with the Union Bank for the payment of its immediate obligations and thus enabling it to secure an opportunity to realize upon its assets. As a result of such negotiations a contract was entered into by and between the two banks through their boards of directors. By its terms the Union Bank was to assume the payment of all the liabilities of the American Bank, receiving therefor cash and such bills receivable as it was willing to accept at par and without recourse. The difference between the amounts so received and the liabilities assumed was to be represented by three non-negotiable promissory notes of the American Bank, the payment of which was to be secured by a pledge of all its remaining assets to Thomas L. Kimball, as trustee. This contract was carried out. The Union Bank moved into and took possession of the offices of the American Bank. Upon adjustment, as above indicated, the difference was found to be $201,000, for which the American Bank executed to the Union Bank three non-negotiable promissory notes, each being for $67,000, and payable in one, two and three years, respectively. In accordance with the contract the remaining assets of the American Bank were placed in the hands of the trustee, Thomas L. Kimball, who proceeded to collect them and apply the proceeds on the notes until his death during the pendency of this suit. Subsequently a successor was appointed, who continued in performance of the trust until the entry of the decree. The execution of the contract of December 21, 1895, by the president

and cashier of the American Bank was directed by resolution of its board of directors. On January 14, 1896, at an annual meeting of the shareholders of that bank, at which was represented 1,665¾ shares out of a total of 2,000, a resolution was adopted instructing the directors to take action looking to the liquidation of the bank. On February 25, 1896, another meeting of the shareholders was held, at which 1,696 shares were represented, and a resolution for voluntary liquidation was adopted by an affirmative vote of 1,639¾ shares. The Union Bank fulfilled its obligations under the contract, having taken up all the liabilities assumed by it. The trustee meeting with little success in collection of the assets, this suit was, after the first note had matured, instituted in the Circuit Court of the United States for the District of Nebraska by Sumner Wallace, a citizen of New Hampshire, to whom the note had been transferred, against the Union Bank, Thomas L. Kimball the trustee, the American Bank and its stockholders, including the appellants. By an amended bill the complainant sought on behalf of himself and all other creditors of the American Bank the winding up of the affairs of that bank, the determination of the amount due upon his note, the ascertainment of all the creditors and the amounts of their claims, the subjection of the remaining assets to the payment of those claims and the enforcement of the liability of the stockholders. He had not reduced the note to judgment prior to the commencement of this suit. Upon a final hearing a decree was entered ascertaining the amounts due the complainant and the Union Bank, (they being the only creditors) after the application of all credits, the number of shares of stock held by each shareholder of the American Bank and directing a recovery of $97.23 on account of each share of stock. This decree was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit, 68 C. C. A. 40; 135 Fed. Rep. 286, from whose decision an appeal was taken to this court.

Mr. Justice BREWER delivered the opinion of the Court.

A matter of jurisdiction is first presented. The note, which is the foundation of plaintiff's suit, is one made by the American Bank to the Union Bank, both located in Nebraska, and under the statute, for the purpose of jurisdiction, to be considered citizens of Nebraska. 25 Stat. 436; sec. 4. The plaintiff is a citizen of New Hampshire. He could not maintain an action against the maker of the note, although a citizen of a State other than that of the maker and payee. 25 Stat. 434; sec 1. But if diverse citizenship was the sole basis of the jurisdiction of the Circuit Court, the decision of the Court of Appeals would be final and there would be no appeal to this court. 25 Stat. 828; sec. 6. But the jurisdiction of the Circuit Court was not invoked on the ground of diverse citizenship—at

least, not on that alone. The case presented was one arising under the laws of the United States. It was a suit to enforce a special right given by those laws. Section 5 220 Rev. Stats. reads: "Any [national banking] association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock."

By section 5151 Rev. Stats., stockholders in national banks are made liable for "all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such share." Section 2 of the act of June 30, 1876, (19 Stat. 63,) is as follows:

"SEC. 2. That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

More than two-thirds of the stock voted, on February 25, 1896, for a voluntary liquidation, and on April 27, 1896, the Comptroller of the Currency formally approved the liquidation and notified the cashier of the American Bank to that effect.

In proceeding, therefore, by this suit to enforce in behalf of himself and all other creditors of the American Bank the extra liability imposed by Rev. Stats. sec. 5151, a case was presented arising under the laws of the United States, and of which, independently of the matter of diverse citizenship, the Circuit Court had jurisdiction.

The bill is not multifarious. "The two subjects of applying the assets of the bank and enforcing the liability of a stockholder, however otherwise distinct, are by the statute made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank." *Richmond* v. *Irons*, 121 U. S. 27, 50.

It is suggested that no judgment had been obtained upon the note prior to this suit in equity, but as one object of the suit was to subject to the satisfaction of the debt certain property conveyed to a trustee as security therefor, no judgment at law was a prerequisite. *Day* v. *Washburn*, 24 How. 352; *Case* v. *Beauregard*, 101 U. S. 688, 691, in which the court said:

"Without pursuing this subject further, it may be said that whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. *Tappan* v. *Evans*, 11 N. H. 311; *Holt* v. *Bancroft*, 30 Ala. 193."

We come then to the final question in the case, and that is whether the notes executed by the American Bank were its valid obligations. And in reference to this question these are the significant facts: The demands against the American Bank were pressing. It had not the money with which to meet them. It arranged with the Union Bank to advance the money for the payment of all its outstanding obligations. When the Union Bank paid these obligations of the American Bank it was the same as though it advanced money to that bank to pay them. To reimburse and secure the former the latter bank turned over certain property, and executed these notes for the balance, securing them by a pledge of all its other assets which were placed in the hands of its president, as trustee.

All the stipulations and agreements made by the directors of the two banks were carried out in good faith; and, with full knowledge of what had been done, the stockholders voted for a voluntary liquidation. The borrowing of the money by the American Bank did not necessarily put it into liquidation. It had a large amount of assets, and if the real had equaled the nominal value of these assets it would have been enabled after discharging its obligation to the Union Bank to continue business. But on an examination the stockholders felt that it was wiser to stop at once. But that decision did not at all impugn the wisdom or *bona fides* of the transaction by which the money was obtained to pay off the pressing demands of the American Bank. The question, therefore, is, whether a national bank, finding itself embarrassed, with a large amount of assets, much in excess of its obligations, yet without the cash to make payment of those which are due and urgent, can borrow to meet those pressing demands. A very natural answer is, why not? It is not borrowing money to engage in new business. It simply exchanges one creditor for others. There may be wisdom in consolidating all its debts into the hands of one person. At least such a consolidation cannot be pronounced beyond its powers. When time is obtained by the new indebtedness (in this case a year) it gives the borrowing bank and its officers and stockholders time to consider and determine the wisdom of attempting a further prosecution of business. In the case of an individual it would be a legitimate and often a wise transaction. It is not in terms prohibited by the national banking act. *Aldrich* v. *Chemical National Bank*, 176 U. S. 618, is very clearly in point. The opinion in that case is quite lengthy and considers many authorities, but the gist of the decision is expressed in these words (p. 635):

"Without further citation of cases we adjudge, both upon principle and authority, that as the money of the Chemical Bank was obtained under a loan negotiated by the vice president of the Fidelity Bank who assumed to represent it in the transaction, and as the Fidelity Bank used the money so obtained in its banking business and for its own benefit, the latter bank

having enjoyed the fruits of the transaction cannot avoid accountability to the New York bank, even if it were true, as contended, that the Fidelity Bank could not consistently with the law of its creation have itself borrowed the money."

We are of the opinion that the notes given by the American Bank for the money advanced by the Union Bank were its valid obligations and can, therefore, be enforced against its stockholders.

The decree of the Circuit Court of Appeals is

Affirmed.

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192 Peter Frenzer et al., Appellants, *vs.* Sumner Wallace et al.

193 Edgar M. Morsman, Appellant, *vs.* Sumner Wallace et al.

195 George W. McClellan, as Executor, etc., et al., Appellants, *vs.* Sumner Wallace et al.

Appeals from the United States Circuit Court of Appeals for the Eighth Circuit.

These are separate appeals by other stockholders from the same decree, and present no questions other than those considered in the former opinion, and the same decrees of affirmance will be entered.

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194 William S. Poppleton, Appellant, *vs.* Sumner Wallace et al.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

This case is also an appeal by a stockholder from the same decree, and presents only this difference: This stockholder voted against the resoultions passed by the stockholders looking to a voluntary liquidation. There is, therefore, nothing of a personal estoppel to be adjudged against him, but we do not think that that is material. The requisite amount of stock was voted in favor of what was done in the way of voluntary liquidation, and he as a stockholder is bound by that, although personally he dissented from the action. The same decree of affirmance will be entered in this case.